SEP 26 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 457

CONTINENTAL OIL COMPANY,

Petitioner,

against

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROLAND B. VOIGHT,
1300 Main Street,
Houston 2, Texas
Counsel for Petitioner

LLOYD F. THANHOUSER,
1300 Main Street,
Houston 2, Texas
Of Counsel

September 25, 1956

SORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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Petitioner prays that a writ of certiorari issue to review 16 judgments entered on June 30, 1956, by the United States Court of Appeals for the Fifth Circuit (in cases Nos. 15,706 through 15,721 in that Court), which judgments affirmed (a) orders of the Federal Power Commission issued on April 5, 6 and 12, 1955, and (b) an order of the same Commission issued on May 26, 1955, denying Petitioner's motion for rehearing.

These 16 cases involve identical questions. Accordingly, they were consolidated below for purposes of briefing and argument and were decided on the basis of one typical record (R. 1-6; App. 1-2).[1]

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[1] The certified record in this Court consists of the printed transcript in case No. 15,706 and the opinions and judgment in the Court of Appeals, the latter being reproduced in Appendices A and B hereto (App. 1-47). References to pages of the transcript of record are herein indicated by use of the capital letter "R"; references to pages in the Appendices hereto by use of the abbreviation "App."

The present single petition for a writ of certiorari is filed as permitted by paragraph 5 of Rule 23 of the Rules of this Court.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals, printed App. 1-46, are not yet reported.[2] No opinions were rendered herein by the Federal Power Commission.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See also Section 19(b) of the Natural Gas Act (15 U.S.C. § 717r(b); App. 52-53).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission possesses authority under the Natural Gas Act to suspend, nullify or modify in any respect gas sales contracts filed with the Commission as *initial* "rate schedules," in the absence of any proceeding or determination under Section 5(a) of the Act.

2. Whether the Federal Power Commission could lawfully require an "independent producer" of natural gas to file "changes in rate schedules" long prior to the time when such producer filed — or was obligated to file — the basic "rate schedules" to which such "changes" relate; and whether the Federal Power Commission could lawfully deprive such producer of the benefit of tax reimbursement

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[2] Judge Brown's learned dissenting opinion deals with many other cases, argued and decided at the same time and all relating to Federal Power Commission action affecting "independent producers" of natural gas. While much of that dissent has an important bearing here, the part designated *"IV. State Tax Escalation Cases"* (App. 45-46) deals specifically with our cause.

provisions set forth in such producer's gas sales contracts simply because the producer did not file "changes in rate schedules" until the timely filing by the producer of the basic "rate schedules" themselves.

3. Whether the Federal Power Commission may lawfully deprive one "independent producer" of natural gas of the right to receive retroactive tax reimbursement payments due under gas sales contracts filed as "rate schedules," although the Commission permitted numerous other "independent producers" similarly situated to receive the identical kind of retroactive payments.

4. Whether, in depriving Petitioner of the benefit of substantial tax reimbursement payments due under Petitioner's gas sales contracts filed with the Federal Power Commission as "rate schedules," the Federal Power Commission (a) acted unjustly, unreasonably, arbitrarily and capriciously, (b) unlawfully discriminated against Petitioner, (c) acted in violation of the provisions of the Natural Gas Act, and (d) deprived Petitioner of property without due process of law.

STATUTES AND REGULATIONS INVOLVED

Involved herein are various sections of the Natural Gas Act (52 Stat. 821-833; 15 U.S.C. § 717-717w), as amended (56 Stat. 83-84; 61 Stat. 459; 68 Stat. 36). The pertinent sections are set out in Appendix C hereto (App. 49-54).

Also involved are certain regulations prescribed in the following orders of the Federal Power Commission, the pertinent portions of which orders are set out in Appendices hereto, as indicated:

Order No. 174, issued July 16, 1954 (19 Fed. Reg. 4534). See Appendix D, (App. 55-56);

Order No. 174-A, issued August 6, 1954 (19 Fed. Reg. 5081). See Appendix E, (App. 57-73);
Order Modifying In Part Order No. 174-A, issued September 24, 1954 (19 Fed. Reg. 6301). See Appendix F, (App. 74-75).

STATEMENT OF THE CASE

Prior to June 7, 1954,[3] Continental Oil Company (referred to as "Petitioner" or "Continental") entered into 16 long-term contracts covering the sale of natural gas produced in Texas (R. 8, 33-34, 48). These contracts were entered into in good faith and after arm's length negotiations (R. 36).

Each contract contained a provision to the effect that if the Texas tax on natural gas production should be increased above the rate prevailing when the contract was made, the purchaser of the gas would reimburse Continental for all or a stipulated portion of such increase (R. 8, 22, 34, 35-36). Provisions of this sort are customary in all long-term gas sales contracts (R. 36).

A law enacted by the Texas legislature in April 1954, increased the state gas production tax from 5.72% to 9% of market value, effective September 1, 1954 (R. 9, 22, 34). Accordingly, beginning on September 1, 1954, Continental became entitled, under the express terms of its 16 contracts, to receive reimbursement for all or part of the 3.28% tax increase (R. 36).

The Federal Power Commission (referred to as "FPC" or "Commission"), by its orders here in question (R. 31-32, 47-49), denied Continental the right to receive the tax reimbursements to which it was contracually entitled for a period of approximately three months — from September

[3] The date of this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

1st until the latter part of November, 1954. As will presently appear, Continental was thus deprived of substantial sums of money as the result of arbitrary, discriminatory bureaucratic fiat, contrary to the Natural Gas Act, and without any semblance of due process of law.

For 16 years after its passage in 1938, the Natural Gas Act (referred to as the "Act") was generally considered and was construed by FPC as being inapplicable to so-called "independent producers" of natural gas — i.e. persons engaged solely in production or gathering of natural gas and hence independent of any transporter of such gas in interstate commerce. This view prevailed because § 1(b) of the Act expressly stated that: "The provisions of this act... shall not apply... to the production or gathering of natural gas" (App. 49).

On June 7, 1954, this Court handed down its decision in *Phillips Petroleum Co.* v. *Wisconsin* (347 U.S. 672), holding in substance, that Phillips, an "independent producer," was also a "natural-gas company" within the contemplation of the Act and consequently was subject to the regulatory jurisdiction of FPC.[4]

On July 16, 1954, the Commission issued its Order No. 174, containing regulations applicable to all "independent producers" who on or after June 7, 1954, sold natural gas destined for interstate movement and resale (App. 55-56). Issuance of these regulations was based on the Commission's extremely broad interpretation of the decision in the *Phillips* case: "that persons engaged in the production and gathering of natural gas but which also... makes [sic] sales

[4] In reaching this conclusion the Court was at pains to point out "that production and gathering, in the sense that those terms are used in § 1(b), end before the sales by Phillips occur" (347 U.S. at p. 678). This reasoning was consonant with that in the earlier case of *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, where a decisive factor had been that: "By the time the sales are consummated, nothing further in the gathering process remains to be done" (331 U.S. at p. 692).

in interstate commerce for resale are 'natural-gas companies' subject to all the requirements of the Natural Gas Act" (App. 55-56).

So hastily concocted and imperfectly drafted were the regulations prescribed in Order No. 174 that they were repealed within three weeks of their issuance — before they could become operative. On August 6, 1954, the Commission, on its own motion issued Order No. 174-A (App. 57-67). This prescribed a revised set of regulations applicable to "independent producers" and expressly directed that "Order No. 174 issued July 16, 1954, is hereby rescinded and superseded" (App. 67).

The 174-A regulations, so far as pertinent here, provided as follows:

(1) An "independent producer" was defined as: "any person . . . who is engaged in the production or gathering of natural gas and who . . . sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline"[5] (§ 154.91; App. 58-59).

(2) Every "independent producer" who on or after June 7, 1954, sold any gas for interstate movement and resale was commanded to file all his contracts covering such sales as "rate schedules" (§§ 154.92(a), 154.93, 154.99; App. 59- 62). This had to be done on or before October 1, 1954 (§ 154.92(a); App. 59).

(3) With respect to "changes in rate schedules" Order No. 174-A imposed these requirements:

"No change shall be made in any rate, charge, or service in effect on and after June 7, 1954 . . . by

[5] This definition, it will be noted, fails to make any distinction between a producer who sells his gas immediately upon its production and a producer (like those involved in the *Phillips* and *Interstate* cases) who sell gas *after* all production and gathering operations have been completed. Continental's contracts here in question expressly provided that the gas was to be sold and delivered at or near the well, right after its production and before gathering even started (R. 14-15).

any independent producer . . . without first filing a change in rates . . ." (§ 154.94(a); App. 59).

"The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge . . . or service after June 7, 1954 . . . shall constitute a change in rate schedule" (§ 154.94(c); App. 60).

"Any change in rate schedule . . . in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, and prior to September 15, 1954, may be filed on less than thirty days' prior notice . . ." (§ 154.94(d); App. 60).

The last-quoted provision appeared to be a considerable improvement over the corresponding section of the original Order No. 174, which had called for the filing of "changes in rate schedules" by September 15, 1954 — fifteen days before the "rate schedules" themselves were required to be filed (R. 9-10; App. 56).

(4) At least two copies of all "rate schedules" had to be submitted (§ 154.99; App. 62), and a great deal of additional material was ordered to be filed and served in connection with each "change in rate schedule" (§ 154.94(e) and (f); App. 60-61).

(5) All "independent producers" were further commanded to file, on or before October 1, 1954, fifteen copies of a voluminous and complicated "application for certificate of public convenience and necessity" in respect of each interstate sale of gas made by such producer on or after June 7, 1954 (§§ 157.23-157.27; App. 62-67).

Thus, under Order 174-A Continental was faced with the necessity of preparing and filing literally thousands of copies of "rate schedules," "changes in rate schedules" and "applications for certificates of public convenience and necessity" — and all this had to be accomplished by

October 1st, less than eight weeks after Order 174-A was promulgated.[6]

On September 24, 1954, the Commission confessed that it had imposed a "hardship" on "independent producers" by saddling them with filing requirements, compliance with which was in many instances virtually impossible. The Commission accordingly issued an order modifying Order No. 174-A so as to postpone the deadline for filing all "rate schedules" and "applications for certificates of public convenience and necessity" for another two months — until December 1, 1954 (App. 74).

Prior to September 24, 1954, more than a score of Continental's employees had been diligently working full time — and overtime — in a vain effort to meet the October 1st deadline (R. 10, 37). Upon learning of the extension of that deadline to December 1st, Continental permitted its employees to reduce their overtime work (R. 11, 37). This was done in good faith and in reliance on the Commission's orders, including the provisions of § 154.94(d) of Order No. 174-A, which seemingly eliminated the mistake in original Order No. 174, calling for the filing of "changes in rate schedules" fifteen days before the "rate schedules" themselves were required to be filed (R. 11, 37).

All of the voluminous material which Order No. 174-A directed Continental to file by December 1, 1954, was delivered to the Commission well in advance of that date (R. 11, 37). The bulky material respecting the 16 Texas contracts involved herein was forwarded to FPC as soon as it was ready and was mailed in time to reach FPC for filing on the 26th and 29th of November (R. 8, 11, 37, 48).

All of Continental's filings were made under protest, in order to avoid possible prosecution and heavy penalties pre-

[6] Continental's initial filings with the Commission ultimately aggregated over a quarter ton of paper; the postage alone came to about $600.

scribed in Section 21 of the Act (App. 54) for violations thereof or of the Commission's regulations thereunder, and with appropriate objections and reservations as to the Commission's jurisdiction and as to the validity of its Orders Nos. 174 and 174-A (R. 7, 21-22, 39).

Accompanying each of the 16 contracts involved in these cases, when and as it was timely filed with FPC as a "rate schedule," Continental filed — also under protest — a document called "Change in Rate Schedule" (R. 7-8, 21-30, 34, 48). Each such document stated that the purpose of the change was "to reflect the reimbursement for increase in taxes due Continental in accordance with such Contract," and each "proposed that such change be made effective as of September 1, 1954, for gas sold on or after such date" (R. 22).

More than four months later, on April 5, 6 and 12, 1955, the Commission wrote letters (which, it is conceded by FPC, had the force and effect of formal orders — R. 55; App. 4), holding that Continental could collect the tax reimbursements only from the date when its filings were made — i.e. November 26 or 29, 1954 — and not from September 1, 1954, when the reimbursements began to fall due under the express terms of the contracts (R. 8, 11, 31-32, 34-35, 47-48).

Promptly thereafter, Continental moved for rehearing in each of the 16 cases (R. 8, 12-13, 33-44). These motions pointed out that not only had Continental been arbitrarily and unlawfully denied the right to collect substantial sums justly due and owing, but that Continental and many Texas producers similarly situated had been the victims of rank discrimination, in that numerous other "independent producers" had been allowed by FPC to collect the identical sort of reimbursements of increased Texas production taxes retroactively to September 1, 1954 (R. 11-13, 35). Rehearing was accordingly prayed for, not only because the Commis-

sion's action had been contrary to the Act and the FPC's own regulations thereunder (R. 38), and had "deprived Continental of a valuable property right without due process of law" (R. 39), but also because such action had been patently discriminatory (R. 36).

By a single order issued on May 26, 1955, the Commission denied all 16 of Continental's motions for rehearing (R. 13-14, 47-49). Although such motions had brought to light for the first time the Commission's inconsistency in granting some "independent producers" retroactive tax reimbursements while denying equal treatment to others in the same situation, the order contained a stereotyped "finding" that:

> "The said motions for reconsideration and rehearing set forth no new facts and no principles of law which either were not fully considered . . . or which having now been considered warrant any change . . ." (R. 49).

Applications for review were made to the United States Court of Appeals, Fifth Circuit, pursuant to section 19(b) of the Natural Gas Act (App. 52-53) and section 10 of the Administrative Procedure Act, 60 Stat. 243; 5 U.S.C. §1009 (R. 7). After argument (R. 50), two Circuit Judges concurred in an opinion holding that the FPC's orders should be affirmed (App. 1-10). Their narrow and (we respectfully submit) erroneous reasons for this conclusion are pointed out in Judge BROWN's dissenting opinion (App. 11-46), and will be further discussed below.

REASONS FOR GRANTING THE WRIT

The outcome of these cases directly affects not only the substantial property rights of Continental, but also the similar rights of many other Texas gas producers and of

untold numbers of royalty owners (R. 13, 38). In the aggregate, a very large sum of money is involved.[7]

I

The Commission's regulations and orders concerning "changes in rate schedules" were clearly contrary to law and to this Court's decision in United Gas Pipe Line Company v. Mobile Gas Service Co. 350 U.S. 332.

The first important question presented concerns FPC's authority — or lack of it — to suspend or change any part of a "rate schedule," *upon its original or initial filing.* The Commission's powers in this regard are governed by sections 4 and 5 of the Act (App. 49-52). This Court recently reviewed those very sections in *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.,* (350 U.S. 332), and unanimously held as follows:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, *the Act expressly recognizes that rates to particular customers may be set by individual contracts*"[8] (350 U.S. at p. 338).
>
> "These sections [4(d) and (e) and 5(a)] are simply parts of a single statutory scheme under which *all rates are established initially by the natural gas companies, by contract or otherwise,* and all rates are subject to being modified by the Commission upon a *finding* that they are unlawful. The Act merely defines the review

[7] The State of Texas produces annually about 4.5 trillion cubic feet of marketed gas — 52% of the U. S. total. Approximately 2.2 trillion cubic feet of this gas is consumed within the State, so that some 2.3 trillion cubic feet go each year into the interstate market. (Data issued by Texas Mid-Continent Oil & Gas Assn.) Hence, a variation in price of as little as one-half cent per thousand cubic feet of the interstate supply would amount to $11,500,000 annually, or $2,875,000 for the three-month period here in question.

[8] Emphasis in all quotations herein is ours.

powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor define the initial rate-setting powers of natural gas companies.

"The powers of the Commission are defined by §§4(e) and 5(a). The basic power of the Commission is that given it by §5(a) to set aside and modify any rate or contract which it determines, *after hearing*, to be 'unjust, unreasonable, unduly discriminatory, or preferential.' This is neither a 'rate-making' nor a 'rate-changing' procedure. *It is simply the power to review rates and contracts made in the first instance by natural gas companies* and, if they are determined to be unlawful, to remedy them. * * * All that §4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract * * * . *The scope and purpose of the Commission's review remain the same — to determine whether the rate fixed by the natural gas company is lawful.*

"The limitations imposed on natural gas companies are set out in §§4(c) and 4(d). The basic duties are filing requirements * * * " (350 U.S. at pp. 341-342).

"All of the relevant provisions of the Act can thus be fully explained *as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies,* and there is nothing to indicate that they were intended to do more. Admittedly the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined. *The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act* * * *" (350 U.S. at p. 343).

In the cases at bar, Continental's rates were duly established in its arm's length gas sales contracts. An inseparable part of those contracts consisted of clauses calling for reim-

bursements to Continental in the event of any increase in the Texas gas production tax. Such an increase had been enacted by the Texas legislature in April 1954 — some two months prior to this Court's decision in the *Phillips* case. Continental accordingly possessed a vested contractual right to receive the reimbursements by the time the *Phillips* decision was rendered on July 7, 1954.

The contracts themselves were ordered by FPC to be filed as initial "rate schedules." So far as those "rate schedules" were concerned, *as originally filed*, the Commission possessed no authority whatever to suspend, nullify or otherwise vary a single provision, without due procedure under section 5(a) of the Act. That would have meant a hearing and a determination (if warranted) that certain provisions in the original "rate schedule" were unjust, unreasonable or otherwise unlawful.

The Commission held no section 5(a) hearings in these cases. It made no determinations of unlawfulness. On the contrary, by allowing all Texas tax reimbursement clauses to become automatically effective — sooner or later — FPC recognized the complete propriety of that type of contractual provision.

Nevertheless, the Commission did presume to suspend and nullify the tax reimbursement provisions in the *initial* "rate schedules" of Continental and of many other Texas producers. This was accomplished by the simple device of decreeing that section 4(d) of the Act would be applicable to certain integral portions of the original "rate schedules." Section 4(d), however, relates solely and exclusively to *subsequent* changes in "rate schedules" — changes made *after* their initial filing — and is wholly inapplicable to the original "rate schedules" themselves.

To make matters worse, the Commission applied the inapplicable provisions of section 4(d) in such a way as to

produce *retroactive* changes in the initial "rate schedules"; such changes being ordered by FPC to be effective for as long as three months *before* the "rate schedules" were duly and timely filed. This constituted a further unauthorized and illegal assumption of power, for Section 5(a) of the Act specifically provides that the Commission may only "determine the just and reasonable rate . . . to be *thereafter* observed and in force" (App. 52).

When Order No. 174-A was issued, Commissioner DIGBY dissented. He pointed out forcefully that the Order clearly exceeded the Commission's authority in the very respects hereinabove mentioned (App. 68-69):

> "It is my opinion that the majority of the Commission has exceeded its rule-making authority in adopting this *ex parte* and unilateral order. The effect of this order will not only fix rates retroactively to June 7, 1954, *but will in many instances have the effect of reducing rates or prices of producers which have increased under their sales contracts since June 7, 1954.* Any retroactive date is arbitrary. There would be as much sanction in law for making these regulations retroactive to the effective date of the Natural Gas Act in 1938 as any other retroactive date. *This, in my opinion, is in violation of the express provisions of the Natural Gas Act which prohibits the fixing of rates retroactively.* I also feel that the Order may have the effect of depriving the producers of the provisions of Section 4 of the Natural Gas Act. * * * In freezing the producer's rate as of June 7, 1954, *they are deprived of any opportunity to file as an original rate schedule a sales contract in which the price of gas has increased since June 7, 1954. Further, original tariffs or rates cannot be suspended by the Commission and the company is entitled under the law to collect the filed rate at least until after an investigation by the Commission with a final determination concerning the rate.* In these particulars, at least, it is my opinion that *the*

Order adopted by the majority of the Commission may deprive independent producers, as defined in that Order, of their right of due process of law."

The majority in the court below failed even to consider this important and fundamental question as to FPC's authority to suspend and nullify a part of an *initial* "rate schedule." As Judge BROWN pointed out in his dissenting opinion (App. 45):

> "These cases raise the question of the collectibility of increases in the Texas State Production Tax as provided under automatic rate increase escalation provisions in the contracts. Thus they present, in dramatic fashion, the question so vigorously argued by all petitioners on the propriety of the regulation forbidding escalation clauses. *The Court in arriving at a decision, presumably on the merits, completely bypasses this question.* If, as my discussion indicates, that order may be invalid, then the Commission had no right in these cases to forbid Continental Oil Company from collecting the increase from its effective date (September 1, 1954)."

II

The Commission's orders herein were unjust, unreasonable, arbitrary and capricious to the point of illegality.

The mischief in these cases started with what Judge BROWN characterized as "inadvertant scrivener errors made under circumstances of understandable and almost hysterical pressure" (App. 46).

The fourth paragraph of § 154.94 of FPC's original 174 Order, issued on July 16, 1954, provided:

> "Any change in any rate schedule . . . which by the terms of said rate schedule is to be operative after June 7, 1954, but prior to September 15, 1954, may be

> filed *within said period* without thirty days' prior notice, which notice is hereby waived" (App. 56).

Order No. 174-A was issued on August 6, 1954, in order, among other things, to "clarify § 154.94" (App. 58). To accomplish this "clarification," the above-quoted language was revised to read as follows:

> "Any change in rate schedule . . . which by the terms of said rate schedule is to be operative after June 7, 1954, and prior to September 15, 1954, may be filed on less than thirty days' prior notice" (§ 154.94(d); App. 60).

Thus, there was eliminated from the earlier Order the requirement that the "changes in rate schedule" be filed *"within said period"* (June 7 to September 15, 1954). That requirement had obviously been imposed in error. How could a producer be expected to file a "change in rate schedule" at least 15 days before he was called upon to file the "rate schedule" to which such "change" related?

The further modification effected by Order 174-A was to shorten the phrase, "without thirty days' prior notice, which notice is hereby waived," so that it read: "on less than thirty days' prior notice." While this "clarification" failed to eliminate ambiguity, it was fairly obvious that the "thirty days' prior notice" mentioned in both the original and revised versions had reference to the notice requirements appearing in Section 4(d) of the Act:

> "(d) Unless the Commission otherwise orders, no change shall be made . . . *except after thirty days' notice to the Commission* . . . Such notice shall be given by filing with the Commission . . . new schedules stating plainly the change or changes to be made . . . *and the time when the change or changes will go into effect.* The Commission, for good cause shown, *may allow*

changes to take effect without requiring the thirty days' notice herein provided for . . . " (App. 50).

In the light of this statutory language, it seemed evident that the words, *"on less than thirty days' prior notice,"* in Order No. 174-A were intended to be the equivalent of the words *"without thirty days' prior notice,"* which had appeared in the superseded Order No. 174.

Be that as it may, a reading of Section 4(d) of the Act revealed that the person filing a "change in rate schedule" could specify therein *"the time when the change or changes will go into effect"*; and if the 30 days' notice requirement was waived by the Commission — as had apparently been done in this instance — there was no apparent reason why the designated effective date could not be one which preceded the filing date.

In any event, it still seemed perfectly clear that no producer could reasonably be expected to file a "change" in a "rate schedule" before the latter was itself on file.

When, on September 24, 1954, the Commission extended the filing deadline from October 1st to December 1st, Continental and other "independent producers" — all faced with the staggering problem of preparing, serving and filing great heaps of material — received sorely needed relief. A fair prospect then arose that FPC's onerous filing requirements could be complied with in due time.

And so, relying in good faith on the Commission's own regulations, Continental and many other producers finally were able to get their mountains of paper into the Commission's hands between the 1st of October and the postponed deadline date of December 1st. Continental filed its Texas "rate schedules" and all "changes" therein simultaneously, on November 26th and 29th — the earliest possible dates when the corresponding "changes" could have

been filed. Each "change in rate schedule" designated September 1st — the date as of which the tax reimbursements began to fall due under the contracts — as the effective date of the change.

More than five months later, FPC notified Continental that it had been booby-trapped: although Continental had assiduously complied with all of the Commission's time requirements for filing, Continental somehow deserved to be penalized by being deprived forever of almost three months' tax reimbursements. The Commission deigned to permit Continental's "changes" to become effective as of the late November filing dates, rather than as of September 1st. The Commission made no adverse findings and gave no reasons for this wholly unjust, unreasonable, arbitrary and capricious action.

Continental applied for rehearings and afforded the Commission an opportunity to rectify its blunders. Thereupon, to quote Judge BROWN again, "Government administrators, with their inevitable parochial provincialism" (App. 16) declined to face up to their mistakes. As a cover, they employed "stereotyped rubric" (App. 44) as the official explanation for refusing to reconsider their inexplicable ruling. This refusal surely "bordered upon complete administrative irresponsibility" (App. 43).

"Complete administrative irresponsibility," in these circumstances, deprived Continental of many thousands of dollars without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

The majority in the court below upheld the Commission's orders, first, by "bypassing" the basic question as to the Commission's authority to suspend or nullify a part of an *initial* rate schedule; secondly, by ignoring the fact that it is impossible to "change" a "rate schedule" before such

"rate schedule" has been filed or is required to be filed; and, lastly, by adopting the following line of sophistical reasoning urged upon the court by FPC's attorneys:

> (a) The Commission acted compassionately in depriving Continental of only three months' tax reimbursements. Technically (it was contended), FPC might have amerced Continental for another 30 days. "Having thus received the benefit of the discretion which was exercised in its favor, petitioner is in no position to complain that it has been deprived of any of its rights under Section 4(d) of the Act" (App. 7).
>
> (b) "petitioner's loss is not attributable to the Commission's action, but to its [Petitioner's] own delay" (App. 9).

Argument (a) overlooks the undeniable fact that Section 4(d) of the Act vests the Commission with no authority whatever to reduce a producer's rates *retroactively* or to modify his "rate schedule" contracts upon their *initial* filing. Argument (b) simply translates strict and timely compliance with all the Commission's filing requirements as meaning — "delay!"

III

The Commission's orders herein were discriminatory to the point of illegality.

The record shows (R. 11-12, 35, 36-38), without contradiction or explanation, that numerous Texas producers of natural gas were permitted by the Commission to collect reimbursements of increased state production taxes retroactively to September 1, 1956; whereas numerous other Texas producers, including Continental, were accorded just the opposite treatment. The latter were denied the right to collect similar reimbursements for any part of the period from September 1st up to the filing date — in Continental's case, November 26th or 29th.

It appears that FPC evolved *in camera* an unpublished rule-of-thumb for use in such cases: if the producer happened to get his papers into FPC's hands on or before October 1st, he was allowed to collect the higher tax reimbursements retroactively to September 1st; otherwise the filing date (from October 2nd to December 1st) was ruled controlling. The shocking consequences of this arbitrary, secret rule-of-thumb were that Continental and a host of other Texas producers were deprived forever of hundreds of thousands of dollars justly due them under contracts which they had filed with the Commission as "rate schedules" in due time and in strict compliance with FPC's published regulations.

The majority in the court below disposed of this question by asserting that the record before the court was deemed inadequate and that the court could not reach a decision *"in vacuo"* (App. 6). The completely fallacious nature of this portion of the majority opinion is exposed in Judge BROWN'S dissent, as follows (App. 45-46):

> "Moreover, the Court's opinion in emphasizing the fact that there was no proof in the record of discrimination in favor of other companies under like situations overlooks the fact that *the petition for rehearing, declined by the Commission, raised those facts and that charge. When it was overruled, I am at a loss to understand how the petitioner could have made any proof.* Finally, while the transmutations of the order and the change of dates from September 15 to October 1 and December 1 as set forth in the opinion is accurate, it seems to me that *the whole Act imposes on the Commission the necessity of having some reasonable basis for its actions.* Conceding, for the moment, that there was intended significance in what appears to me to be inadvertent scrivener errors made under circumstances of understandable and almost hysterical pressure, *I would have considerable doubt that a Com-*

mission may say to one Texas producer that if the application is filed on October 1, the increase can relate to September 1, but if it is filed on October 2 or November 29, it may not. Not a single reason has yet been advanced to justify that differentiation, and it is evident from the fact that the 174 Orders finally extended filing dates to December 1, that the Commission did not articulately do this because of some administrative necessity."

CONCLUSION

The Court of Appeals for the Fifth Circuit has, in these cases, decided important questions of federal law which have not, but should be, settled by this Court. The court below has also decided a federal question in conflict with this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.* (350 U.S. 332). The court below has, furthermore, so far sanctioned a departure by the Commission from the usual and accepted course of regulatory and judicial proceedings as to call for an exercise of this Court's power of supervision.

Accordingly, as indicated in paragraph 1(b) of Rule 19 of the Rules of this Court, a writ of certiorari should be granted.

Respectfully submitted,
ROLAND B. VOIGHT,
Counsel for Petitioner

LLOYD F. THANHOUSER,
Of Counsel

September 25, 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 457

CONTINENTAL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The orders of the Federal Power Commission (R. 31–49) are not reported. The opinion of the Court of Appeals (Pet. App. A, pp. 1–46) is not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on June 30, 1956 (Pet. App. B, pp. 47, 48). The petition for a writ of certiorari was filed on September 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTION PRESENTED

Whether the Federal Power Commission erred in refusing to permit a rate change filed by an independent producer of natural gas, pursuant to a provision in its sales contracts which were filed by the producer as its initial rate schedules on November 29, 1954, to become effective as of September 1, 1954, three months prior to the date of filing.

STATUTE AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission regulations are set forth in the Appendices to the Petition at pages 49–75.

STATEMENT

This case involves sixteen petitions to the Court of Appeals for the Fifth Circuit to review orders of the Federal Power Commission refusing to permit rate increases filed by petitioner, an independent producer of natural gas, to become effective as of a date three months prior to that on which petitioner filed the proposed increases with the Commission. The Court of Appeals affirmed (Pet. App. A, pp. 1–47). The pertinent facts may be summarized as follows:

Background. On June 7, 1954, this Court held in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, that sales by independent producers of natural gas for resale in interstate commerce are subject to the provisions of the Natural Gas Act. As a direct result, an entire segment of the natural gas industry was subject to Commission regulations issued pursuant to the

Act which, having been designed primarily for the regulation of pipeline companies, were ill-suited to independent producers. To bring the independent producers within the regulatory framework of the Act as fairly and expeditiously as possible, and to avoid subjecting them to the detailed requirements of its existing regulations applicable to "natural gas companies," the Commission on July 16, 1954, issued Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to "independent producers" (as there defined). This order, amended and reissued as Order No. 174–A on August 6, 1954 (19 F. R. 5081), directed such independent producers by October 1, 1954 to file, *inter alia*, schedules of their existing rates as of June 7, 1954 (the date of the *Phillips* decision) as their initial rate schedules (Pet. App. D. p. 59). Order No. 174–A further provided (Pet. App. D, pp. 59–60):

> § 154.94. *Changes in Rate Schedules*—(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section.
>
> (b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file

with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

The Present Case. Prior to the *Phillips* decision, petitioner had entered into sixteen long term contracts for the sale for resale of natural gas produced in

Texas, which provided that, whenever during the period of the contract the Texas gas production tax was increased, the price to the purchasers would be increased by three-fourths of the amount of the increase. The Texas Legislature in April 1954 increased this tax from 5.72 per cent to 9 per cent, effective September 1, 1954 (Pet. App. A, pp. 1–2).

Beginning with the issuance of the Commission's Order No. 174 on July 16, 1954, petitioner continually challenged the Commission's jurisdiction to regulate its natural gas sales. Along with other producers, it attacked the validity of Order No. 174–A before the Commission in motions for stay and rehearing filed after the issuance of that order in August 1954.[1] Following the hearing on the motions to stay Order No. 174–A, the Commission extended time for filing rate schedules and certificate applications to December 1, 1954.[2]

All during this time, in fact as early as April 1954, petitioner knew that it would be entitled under its contracts to raise its rates for the sale of Texas gas as of September 1, 1954 (Pet. p. 4). Petitioner was

---

[1] On November 26, 1954, three days prior to filing its rate schedules, petitioner had petitioned the Commission for a declaration that sales for resale under a certain contract were not in interstate commerce (Pet. App. A, p. 3).

[2] Simultaneously with this extension, the Commission revised Section 154.94 (c) to read (Pet. App. F, p. 75):

"The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule."

also aware that, while the Commission's regulations since July 1954 permitted waiver in whole or in part of the 30 day notice provision of Section 4 (d) of the Act, they, in addition, required that a rate increase of this character could become effective only after being filed with the Commission pursuant to that Section. However, petitioner did not file the proposed rate changes, resulting from the increase in the Texas tax, until November 29, 1954, at which time it filed its initial schedules. In the present applications, petitioner, preserving its objections to the Commission's jurisdiction, requested that the rate change be made retroactive to September 1, 1954, approximately three months prior to the date of filing (Pet. App. A, pp. 3, 4).

On April 12, 1955, the Commission advised petitioner that it had waived the thirty day notice requirement of Section 4 (d) and that the rate changes proposed by petitioner would become effective as of November 29, 1954, the date of filing (Pet. App. A, p. 4). Following the Commission's denial of rehearing, petitioner sought review in the court below and the Court of Appeals affirmed (Pet. App. B, p. 47).

ARGUMENT

Petitioner's contention, that the Commission improperly refused to permit its rate changes, filed on November 29, 1954, to be effective retroactively to September 1, 1954, ignores the clear language and settled reading of Section 4 (d) of the Natural Gas Act. Moreover, the Commission's ruling accords, rather than conflicts. with *United Gas Pipe Line Co.*

v. *Mobile Gas Service Corp.*, 350 U. S. 332. Nor was there any arbitrary or discriminatory action by the Commission in refusing to permit the change to become effective at the earlier date. Petitioner's claims were therefore properly rejected by the court below, and there is no occasion for further review.

1. Petitioner's first contention (Pet. 11–15) is that Order No. 174–A was invalid insofar as it conditioned the effectiveness of rate changes made subsequent to the *Phillips* decision on appropriate filing with the Commission, even though the changes were predicated on pre-existing contract provisions. This position rests on a basic misconception of the Commission's jurisdiction over rates for interstate sales for resale of gas, particularly those of independent producers.

When, on June 7, 1954, this Court held in *Phillips* that sales by independent producers of natural gas for resale in interstate commerce were subject to regulation under the Natural Gas Act, the independent producers engaging in such sales were under an immediate duty to file with the Commission their rates then being charged, as required by Section 4 (c) of the Act and the outstanding Commission Regulations. See the Commission's brief in opposition in No. 418, *Cities Service Gas Producing Co.* v. *Federal Power Commission,* at pp. 10–11. In attempting to minimize the initial impact of *Phillips,* the Commission issued Order No. 174–A which, in addition to relieving the independent producers of some of the more detailed requirements of the Commission's existing regulations, allowed them a reasonable time

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(initially to October 1, 1954, subsequently extended to December 1, 1954) within which to file their initial rate schedules for jurisdictional sales. Under the express terms of Order No. 174–A, the initial rates were those which the independent producers had been charging on June 7, 1954, the date of the *Phillips* decision.[3] Order No. 174–A went on to define rate changes to include "the operation of any provision of the rate schedule providing for future or periodic changes in the rate * * * after June 7, 1954," and prohibited any such rate change from becoming effective "without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section." See *supra,* pp. 3–4. Section 4 (d), in turn, provides that "no change shall be made by any natural-gas company in any such rate [filed with the Commission] except after thirty days' notice to the Commission and to the public." Accordingly, it was plain that all rate changes, including those resulting from contract escalator provisions, would have to follow the filing procedure.

This Commission ruling that the independent producers' contract-provided rate changes were subject

---

[3] Section 154.92 of Order No. 174–A provides:

Filing of rate schedules by independent producer. (a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. * * *

to the filing provisions of Section 4 (d) accords, rather than conflicts, with this Court's recent opinion in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332. In that case, which directly involved Section 4 (d), the Court declared (350 U. S. at 341–342):

> The limitations imposed on natural gas companies are set out in §§ 4 (c) and 4 (d). The basic duties are the filing requirements: § 4 (c) requires schedules showing all rates and contracts in force to be filed with the Commission and § 4 (d) requires all changes in such schedules likewise to be filed. In addition, § 4 (d) imposes the further requirement that the changes be filed at least thirty days before they are to go into effect. It may readily be seen that these requirements are no more than are necessary to implement §§ 4 (e) and 5 (a): the filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of 30-days' advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under §4 (e).

Moreover, the requirement imposed on independent producers that they comply with Section 4 (d) in undertaking to make contract-provided rate changes, far from being an innovation, merely applies to the independent producers the practice consistently followed by the Commission in regard to pipeline companies since the beginning of gas regulation. The law is settled that changes contemplated by contract can

become effective only in the form of changes in existing schedules, as required by Section 4 of the Act. See *Cities Service Gas Producing Co.* v. *Federal Power Commission,* 233 F. 2d 726 (C. A. 10), petition for writ of certiorari pending, No. 418, this Term; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.,* 162 F. 2d 388 (C. A. 5); cf. *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 121 F. 2d 159 (C. A. 8); *Phillips Petroleum Co.* v. *Federal Power Commission,* 227 F. 2d 470, 475 (C. A. 10). No other procedure would permit the Commission to fulfill its obligation to determine whether changes in existing rates, whether proposed by pipeline companies or independent producers, were unjust or unreasonable. If, as petitioner urges (Pet. 11–15), the Commission were required to accept as an initial rate every change provided for in a gas sales contract, the Commission would be powerless to suspend any such rate change for the life of the contracts, which, as with the sixteen contracts here involved, typically run for several years. Thus, if petitioner's view were to be accepted, the Commission's important authority to suspend such rate changes would be nullified, at least as far as the independent producers are concerned.[4] See *Hope Natural Gas Co.* v. *Federal Power Commission,* 196 F. 2d 803, 808–809 (C. A. 4).

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[4] Contrary to petitioner's suggestion (Pet. 13–14), the Commission's action in permitting the rate change to be effective on November 29, 1954, the date of filing, was not retroactive. On the contrary, it was prospective only; it is, of course, this lack of retroactivity on which petitioner bases its further argument that the Commission should have permitted the proposed rate change to be effective as of September 1, 1954, three months prior to its filing with the Commission.

2. Petitioner (Pet. 15–19) further complains that Order No. 174–A lulled it into the belief that it could obtain a retroactive rate change, and hence that the Commission's refusal to allow a change was "unjust, unreasonable, arbitrary and capricious to the point of illegality."

This belief, if held by petitioner, was without foundation. Petitioner recognizes (Pet. 16, 17) that Order No. 174–A, in plain language, advised independent producers that although rate changes could become effective on "less than thirty days' prior notice," prior notice and filing was nevertheless still necessary before the change could become effective. See *supra*, pp. 3–4, 7–8. There can be little doubt, therefore, that petitioner had warning that the Commission intended to enforce the Section 4 (d) requirement of prior notice and that, although the independent producers had until December 1, 1954 to file initial schedules, they were required, if they desired a rate change prior to that date, to file both an initial schedule and the rate change before the change could become operative.

Petitioner claims, however, that the provision in Order No. 174–A that the Commission *might* waive the thirty day notice period led it to believe that the Commission would not only waive the thirty day notice provision, but would also permit rate changes to be effective retroactively. This contention reads the waiver provision far beyond its language and purpose. The clear intendment of the phrase "on less than thirty days notice", on which petitioner re-

lies, is that, although the thirty days notice period might be waived, prior filing with the Commission would nevertheless be required, as provided in Section 4 (d); this very phrase negated any inference that retroactive changes would be allowed. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra.* As the court below recognized (Pet. App. A, p. 8), petitioner

> * * * could only claim that it was entitled to the right to file on "less than thirty days' prior notice" for the all-sufficient reason that the superseding regulations under which it filed clearly required "prior notice." * * * And as we have stated above Section 154.94 of the regulations under which petitioner filed its notice of change in rate does not dispense with "prior notice" but merely permits filing the notice of change in rate "on less than thirty days' prior notice."

Since Order No. 174–A thus required prior filing and notice of rate changes, the Order left no doubt that the effective date of rate changes could not precede the date of their filing.

3. Petitioner's final assertion (Pet. 19–21), that it was discriminated against because other independent producers who filed rate increases prior to October 1 were allowed such increases effective September 1, 1954, is not properly before this Court. The lower court pointed out (Pet. App. A, p. 6) that petitioner did not claim

> * * * that the facts in the cases of "numerous other producers" are either identical to or that they have any relationship to the facts in this

> case, and petitioner frankly concedes that all independent producers who filed such changes in rates between October 1 and December 1, 1954, were, like petitioner, also granted such increases effective as of the filing date and not on September 1, 1954 as requested. Yet, and despite the fact that there is no record before this Court which sets out the facts with respect to the "numerous other producers," we are asked to exceed our province and condemn *in vacuo* the Commission's action herein as being inconsistent with what it did in the other cases. This we are unwilling to do, as petitioner's case must be decided on the certified record and by applying the law to the facts which are before us. Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717 (b).

Petitioner argues, however, that it had no opportunity to establish the facts supporting its claim of discrimination because the Commission denied its petition for rehearing. The short answer to this contention is that, assuming that there was substance to petitioner's claim, the Natural Gas Act provided a procedure whereby petitioner could have substantiated it. Section 19 (b) of the Act provides in part (Pet. App. C, p. 53):

> * * * If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commis-

> sion and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

Petitioner was content to rest on its bare allegations of discriminatory treatment, and did not request the court below to remand the proceeding to the Commission for hearing on this issue. The court below was clearly correct, therefore, in refusing to go outside the record to inquire into this charge. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241.

In any case, petitioner's charges of discrimination have little, if any, substance. The Commission, in carrying out its difficult task of bringing the independent producers within the framework of the Natural Gas Act, allowed, as an administrative matter, the rate changes of certain producers filed during September 1954, to apply to their current billings for that month. While petitioner would have been permitted to do the same thing had it also filed its initial schedule and rate changes during September, petitioner chose instead to defer its filings until two months later, *i. e.,* November 29, 1954. Having thus postponed the filing of its initial schedules and rate changes, petitioner is hardly in a position to complain of the Commission's refusal to make its rate change effective for September, since the request was made two months after the September billings had been made and especially since petitioner does not claim that the other producers who filed after September were treated more favorably.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
WILLIAM W. ROSS,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,
ABRAHAM R. SPALTER,
Attorney,
Federal Power Commission.

OCTOBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

SEP 26 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 457

CONTINENTAL OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROLAND B. VOIGHT,
1300 Main Street,
Houston 2, Texas
Counsel for Petitioner

LLOYD F. THANHOUSER,
1300 Main Street,
Houston 2, Texas
Of Counsel

September 25, 1956

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 15,706 through No. 15,721
(16 cases)

CONTINENTAL OIL COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petitions for Review of Certain Orders of the Federal Power Commission sitting at Washington, D. C.

(June 30, 1956.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: On motion of petitioner and pursuant to order of Court, this case was consolidated with fifteen other causes, each styled *Continental Oil Company* v. *Federal Power Commission,* Nos. 15,706 to 15,721 both inclusive, and comes to us on the printed record in No. 15,706. All of the cases involve petitions for review of orders of the Federal Power Commission which relate to proposed changes in rates filed by petitioner in connection with the increase in the Texas gas production tax which became effective on September 1, 1954. The contracts in question,

the proposed rate increases, and the orders of the Commission making effective such rate increases in November, 1954, are for all intents and purposes identical and the grounds on which petitioner attacks each of these orders are the same.

The facts to the extent that they need be stated are these: The Commission on July 16, 1954, issued Order 174 in which it promulgated rules and regulations applicable to "independent producers" of natural gas subject to the jurisdiction of the Commission. These rules and regulations provided for the filing of rate schedules on or before October 1, 1954, in which were to be set forth the terms and conditions of service and all rates and charges effective on and after June 7, 1954, for the transportation and sale of natural gas in interstate commerce.[1] "Rate schedule" was defined in the regulations to mean "the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954 . . . " And with respect to the periodic increases contained in such basic contracts the regulations provided that: "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule." These regulations pursuant to the provisions of Section 4(d) of the Act further provided that, with certain exceptions, no change could be made in any such rate schedule without first filing a notice of change in rate not less than thirty nor more than ninety days prior to the effective date thereof. One of the exceptions which is pertinent here is Section 154.94

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[1] See detailed statement in *Magnolia Petroleum Company* v. *Federal Power Commission*, No. 15,320, decided this day, relating to the series of 174-Orders which were issued by the Commission following the Supreme Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672.

of the regulations promulgated in Order 174, the fourth paragraph of which reads as follows: "*Any change in rate schedule,* rate, charge, classification, or service provided in a rate schedule *in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, but prior to September 15, 1954, may be filed within said period without thirty days' prior notice, which notice is hereby waived.* If the Commission in any case shall find it necessary to suspend such proposed change, the suspension period will begin with the designated effective date of such change."[2]

On August 6, 1954, the Commission issued Order 174-A by which it amended, modified and superseded Order 174. The superseding order retained the October 1 filing date, but it amended in material respect the fourth paragraph of Section 154.94 to provide that notices of changes in rates to become effective between June 7 and September 15, 1954, "may be filed on less than thirty days' prior notice." Thereafter, on September 24, the superseding Order 174-A was amended by extending the time for filing rate schedules and applications for certificates of convenience and necessity from October 1 to December 1, 1954, but no further change was made in Section 154.94 and no extension of time for filing notices of change in rate schedules was granted by this order.

In its petition for review petitioner herein alleged that it had on November 26, 1954, filed with the Commission a petition in which it prayed for an order declaring that its sales under a certain contract dated January 25, 1950, for the sale of natural gas to Texas Illinois Natural Gas Pipeline Company were not sales in interstate commerce. Thereafter and on November 29, pursuant to the aforementioned

[2] All italics herein ours.

regulations, petitioner under protest and with jurisdictional reservations filed its rate schedule which consisted of the 1950 contract and all amendments and supplements thereto reflecting rates and charges in effect on June 7, 1954, for its sales to the pipeline company. On the same date, petitioner also filed a proposed change in rate schedule. In this filing, petitioner referred to the provision of the 1950 contract which required reimbursement by the purchaser of three-fourths of any increase in gas production tax paid by petitioner, and called the Commission's attention to the fact that on September 1, 1954, the Texas occupation tax on the production of gas had been increased from 5.72% to 9% of the market value, and "proposed that such change be made effective as of September 1, 1954, for gas sold on and after such date." By letter dated April 12, 1955, issued by the direction of the Commission,[3] petitioner was advised that the Commission had waived the thirty days' notice prescribed by Section 4(d) of the Act with respect to its change in rate, and that the change was permitted to become effective as of the date of filing, that is, on November 29, 1954. Following this action by the Commission, petitioner filed a "Motion for Reconsideration, Rehearing and Superseding of Order or Ruling Issued April 12, 1955," in which it sought to have the Commission permit its proposed change in rate to become effective as of September 1, 1954. In this motion petitioner alleged that it was informed and believed that numerous other producers who filed their proposed rate changes based on the increase in the Texas production tax were granted such increase retroactive to September 1, 1954, and contended that the refusal to grant such increase to petitioner deprived it of a valuable property right without due process of law, and was

[3] The Commission concedes that its action by letter in effect constitutes an order under Section 4(d) of the Act.

unjust, unreasonable, unduly discriminatory, preferential, unlawful, arbitrary, capricious, and in violation of the Natural Gas Act. Petitioner also contended that since the Commission failed to act upon its notice of change in rate within thirty days after it was filed, the order of April 12, making the change effective on November 29, 1954, was an unlawful "suspension" of rates and was in violation of the Commission's own rules. In addition, petitioner also filed with the Commission a motion to consolidate similar motions for reconsideration in each of the aforementioned sixteen cases. Upon consideration of these motions the Commission on May 26, 1955, issued an order in which it referred to the proposed changes in rates as "covering sales of natural gas, subject to the jurisdiction of the Commission" and stated "That said motions for reconsideration and rehearing set forth no new facts and no principles of law which either were not fully considered by the Commission when it permitted the aforesaid rate schedules to become effective or which having now been considered warrant any change in, or modification of, the effective dates of such rate schedules." And having so concluded the Commission ordered that the motions for reconsideration and rehearing, as well as the motion for consolidation, be denied. Following this action of the Commission, petitioner filed the within petition for review in which it prayed that this Court vacate and remand the order of April 12 and direct the Commission to issue a new order making the change in rate effective on September 1, 1954. And it was further prayed that if the order of May 26 constitutes an adjudication of petitioner's status, the same be reversed and remanded to the Commission for adjudication pursuant to hearing on petitioner's petition for a declaratory order.

Petitioner's principal argument here is bottomed upon the contention that the Commission abused its discretion

and established an unlawful and preferential disparity in rates by permitting rate changes filed by other independent producers *prior* to October 1, 1954, to become effective as of September 1, while refusing to grant the same effective date to petitioner's rate changes which were filed *after* October 1. There is, however, no claim on the part of petitioner that the facts in the cases of "numerous other producers" are either identical to or that they have any relationship to the facts in this case, and petitioner frankly concedes that all independent producers who filed such changes in rates between October 1 and December 1, 1954, were, like petitioner, also granted such increases effective as of the filing date and not on September 1, 1954 as requested. Yet, and despite the fact that there is no record before this Court which sets out the facts with respect to the "numerous other producers," we are asked to exceed our province and condemn *in vacuo* the Commission's action herein as being inconsistent with what it did in the other cases. This we are unwilling to do, as petitioner's case must be decided on the certified record and by applying the law to the facts which are before us. Section 19(b) of the Natural Gas Act, 15 U.S.C.A. 717r(b).

The record in this case leaves us in no doubt that the Commission's order waiving notice and permitting petitioner's change in rates to become effective on the date of filing was issued pursuant to statutory authority and is valid. Section 4(d) of the Act provides that no change shall be made in any rate schedule except after thirty days' notice to the Commission and that the Commission for good cause shown may allow changes to take effect without requiring the thirty days' notice. This simply means that in the absence of a waiver of the requisite thirty days' prior notice, a change in rate may go into effect no sooner than thirty days after a notice of change is filed. Consequently,

under the plain terms of Section 4(d), absent a waiver of notice by the Commission, the effective date of petitioner's November 29 filing would have been December 29, 1954, but no date previous thereto. But here, there was such a waiver and the Commission by its order of April 12, 1955, exercised the discretion delegated to it by Section 4(d) and so advised petitioner by stating that "notice is hereby waived to permit such rate schedule to be effective as of the date of filing . . ." Accordingly, petitioner was authorized to collect the increased rate during the entire thirty days' period prior to December 29. Having thus received the benefit of the discretion which was exercised in its favor, petitioner is in no position to complain that it has been deprived of any of its rights under Section 4(d) of the Act.

Petitioner's further claim that the Commission's action was invalid under the regulations upon which petitioner had in good faith relied is equally without merit. Petitioner did not file its notice of change in rate within the period specified in Section 154.94 of the regulations promulgated in Order 174. On the contrary, petitioner filed its change in rate more than three months after Order 174 had been rescinded and superseded by Order 174-A. And as we have previously set forth in detail above, that superseding order amended the fourth paragraph of Section 154.94 in two material respects: (1) the automatic waiver of the thirty days' prior notice which was contained in Order 174 was rescinded, and (2) the provision in Order 174 that a change in rate schedule (which is to be operative after June 7, 1954, but prior to September 15, 1954) "may be filed *within said period without thirty days' notice, which notice is hereby waived*" was amended and as so amended provided that such changes "may be filed *on less than thirty days' prior notice.*" Thus it is apparent that when peti-

tioner filed its change in rate on November 29, 1954, it was not entitled as a matter of right to the automatic waiver of the requisite prior notice which had been allowed by the rescinded and superseded regulations. It could only claim that it was entitled to the right to file on "less than thirty days' prior notice" for the all-sufficient reason that the superseding regulations under which it filed clearly required "prior notice."

Petitioner next relies upon that provision of the Act which requires that notices of change in rate specify the time when the change will go into effect and pointing to the fact that there is nothing in the Act or in the Commission's orders which requires that the effective date shall be other than the date designated by the independent producer, vigorously contends that the Commission violated both the Act and the regulations by refusing to honor its designation of September 1, 1954, as the effective date of its change in rate. We do not at all agree. Section 4(d) of the Act provides that the change must be filed "at least thirty days *before* they are to go into effect," *United Gas Pipe Line Company* v. *Mobile Gas Service Corp, et al.*, 350 U.S. 332, 342. And as we have stated above Section 154.94 of the regulations under which petitioner filed its notice of change in rate does not dispense with "prior notice" but merely permits filing the notice of change in rate "on less than thirty days' prior notice." Since it thus affirmatively appears that *prior* notice is required, it necessarily follows that the effective date of a change in rate cannot *precede* the date on which notice is filed. Here, petitioner's designated effective date *preceded* its filing of notice of change in rate by eighty-nine days, and this being the situation there is and can be no doubt that the Commission rightly refused to honor the effective date which petitioner designated.

Petitioner's further and closely allied contention that the Commission's order of April 12, 1955, amounts to an unlawful suspension of its change in rate is likewise without merit. This contention is based upon the premise that petitioner's loss of revenue by reason of its inability to charge the increased rates between September 1 and November 29, 1954, was the result of the Commission's exercise of its suspension powers under the Section 4(e) of the Act. We think this argument runs counter to the plain language of Section 4(d) which states, in part, that "no change shall be made by any natural-gas company in any such rate . . . except after thirty days' notice to the Commission . . ." It also overlooks the fact that petitioner failed to timely file the notice which was required in order to give effect to its proposed change in rate schedule as of September 1, 1954, and fails to take into account the circumstance that by filing on November 29, petitioner was entitled to collect the increased rate only as of December 29, 1954, or thirty days after the filing date. This filing was, of course, subject to the Commission's discretionary power to waive notice under Section 4(d) or to suspend the new schedule under Section 4(e) for a limited period "beyond the time when it would otherwise go into effect." Here the Commission elected to exercise its power of waiver, not its authority to suspend. And by virtue of the order petitioner enjoyed the use of its new rate schedule during the entire thirty days previous to December 29, 1954, but its right to collect that rate was never suspended beyond December 29, which was the date when it would otherwise go into effect. It follows that the Commission's order cannot be characterized as a "suspension" order, and that petitioner's loss is not attributable to the Commission's action, but to its own delay.

Petitioner next contends that if the order of May 26 is an adjudication of its status, such adjudication is unsupported by any evidence before the Commission and prejudges without a hearing petitioner's previous petition on file with the Commission for a declaration of its status. For answer we deem it sufficient to say that by using the descriptive terms "covering sales of natural gas, subject to the jurisdiction of the Commission," it was neither found nor determined that petitioner's operations or sales were in interstate commerce or that petitioner is a natural-gas company within the meaning of the Natural Gas Act.

Other matters urged by counsel have been considered but we find nothing in the record to warrant us in disturbing the orders of the Commission. For the reasons assigned, the orders complained of are affirmed, and in conformity with the order consolidating these cases, separate and like judgments will be entered in Cases Nos. 15,707 to 15,721, both inclusive.

BROWN, Circuit Judge, dissenting.

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 15320

MAGNOLIA PETROLEUM COMPANY
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15321

THE OHIO OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15352

THE SUPERIOR OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15354

WESLEY WEST,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15471

GULF OIL CORPORATION AND GULF REFINING COMPANY,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15470

THE TEXAS COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15461

UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15704

HUMBLE OIL & REFINING COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15627

STANOLIND OIL & GAS COMPANY, ET AL.,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15678

CONTINENTAL OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15799

HUNT OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15928

HUNT OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15832

RALPH B. SHANK, TRUSTEE FOR NELSON BUNKER HUNT TRUST ESTATE,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15749

ROY LEE, TRUSTEE FOR HASSIE HUNT TRUST,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15,706 through No. 15,721
(16 cases)

CONTINENTAL OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

[*Petitions for Review of Certain Orders of the Federal Power Commission sitting at Washington, D.C.*]

(June 30, 1956.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

It is with the greatest of deference that I feel myself under the overpowering compulsion of dissenting from my Brothers in these important and carefully considered cases. My differences are deep and fundamental and rest not at all upon a criticism of these opinions which, with articulate craftsmanship, fairly and honestly set forth the principal facts and expound the contentions. It is my view that these decisions are too much the product of an excision under the artificial sterlity of a laboratory test with inadequate regard for the realities. They have absorbed too completely the recurrent plea of the Commission that these cases are not to be reviewed "in a vacuum" — a figure with which I am in agreement as an aid to analysis. A vacuum is to be avoided because a vacuum lacks air, that is, the oxygen, life-giving qualities of facts and actuality. Differing not in the

least on the need for oxygen (facts), it is my view that it is the Court, not these records, which has cut itself off from the abundant supply. For it is not only air which we need and which we have, but gas.

We have been thrice-told, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 86 L. Ed. 1563; *Frozen Food Express* v. *United States*, ... U.S. ...., ... L. Ed.— [Nos. 158-161, October Term 1955, April 23, 1956]; *United States* v. *Storer Broadcasting Company*, ... U.S. ...., ... L. Ed. .... [No. 94, October Term 1955, May 21, 1956], that as the heavy hand of Government descends upon citizen or business, the Court need not, in its sheltered retirement, divorce itself from knowledge of life as though it were something profane or permit Government administrators, with their inevitable parochial provincialism, to determine the nature of the activity being scrutinized through the theoretical notions conceived or contemplated in some monolithic redoubt.

It therefore seems remarkable to me that in thirty-six cases argued over a week's time presenting nearly every situation confronting the gas industry, the Court finds that not a single one is reviewable.[1] This is done, variously stated, on the ground that none of these actions by the Commission is a definitive "Order" having requisite compulsory characteristics.

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[1] If our decisions and *Amerada Petroleum Corporation* v. *Federal Power Commission*, 10 Cir., 231 F. 2d 461, stand, there is no review of these substantial questions in sight, for *Federal Power Commission* v. *Union Producing Company*, D.C. Cir., 230 F. 2d 36; *Gulf Oil Corporation* v. *Federal Power Commission*, D.C. Cir., 230 F. 2d 40, foreclose the equity injunction. During the four days' argument of these cases, I vainly sought from anyone or all of the battery of advocates for the Commission, even a hypothetical situation in which *some* gas producer involved in *some* situation could have *some* significant review. Apparently some slight character of "review" is given to the State Tax Escalation Cases (note 2, *infra*), but in the setting of the approach of nonreviewability in the fundamental jurisdictional situations and the complete bypassing of those problems (though present) in this one group, it indicates to me that in fact no review is really recognized even there.

In my view that comes about from the theoretical approach which does not adequately reckon with the practical everyday processes of the gas industry in its numerous phases, and an appraisal of the impact of these administrative actions in the light of realistic actuality. I think an examination of all of these cases in their major categories will demonstrate the practical decisive business consequences of these actions and, from the standpoint of the technical ripeness or sufficiency of a given case for present review, consideration of all will indicate clearly the existence of at least one case in which *each* significant point is adequately presented. In this analysis[2] and exposition, I approach each case from the standpoint of the basic question of reviewability and decline to find some way, either on the indicated merits or some procedural aspect, to deny review. When the Court is so overwhelmingly committed to a philosophy of nonreviewability that should be, and is, the point of our departure. As I adhere to this approach, comments or statements may frequently appear in which the merits of a particular contention are assayed. These are not to be understood as a variance from my method. They are put forward not to reflect either tentative, or final conclusions, a *pre* or partial judgment on them. They are put forward solely to put flesh on these bones, to show the

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[2] For convenience I group and refer to the cases in these categories: I. Order No. 174 Cases: No. 15320, Magnolia Petroleum Company; No. 15321, The Ohio Oil Company; No. 15352, The Superior Oil Company; No. 15354, Wesley West; No. 15471, Gulf Oil Corporation, Gulf Refining Company; No. 15470, The Texas Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. II. Suspension Cases: No. 15704, Humble Oil & Refining Company; No. 15627, Stanolind Oil & Gas Company; No. 15678, Continental Oil Company; No. 15799, Hunt Oil Company; No. 15928, Hunt Oil Company; No. 15461, Union Oil Company of California, Lousiana Land and Exploration Company. III. Abandonment Cases: No. 15832, Shank, Trustee; No. 14749, Roy Lee, Trustee. IV. State Tax Escalation Cases: Nos. 15706 through 15721, Continental Oil Company.

This division is for convenient, orderly presentation, but the entire opinion applies to all of the cases without regard to topical or category subdivisions.

vital impact of agency action and the existence of substantial, serious, frequently difficult questions.

THE STANDARD OF REVIEWABILITY

At the outset it is plain that, contrary to my Brothers, I find in *Columbia*[3] *Broadcasting System, Inc.* v. *United States, supra*, ample basis for reviewability where regulations thought to be of far-reaching and perhaps devastating effect are yet couched in general terms and directed against no party in particular. Indeed, the presence in the Natural Gas Act[4] of substantial penalties for violation of the regulations brings these cases within the pre-*Columbia* law.[5]

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[3] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." *Columbia Broadcasting System, Inc.* v. *United States, supra*, at 316 U.S. 425, 86 L. Ed. 1575. "The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. * * * The regulations are not any the less reviewable because their promulgation did not operate of their force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract." *Id.* at 316 U.S. 417, 86 L. Ed. 1571. "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it. * * *" *Id.* at 316 U.S. 420, 86 L. Ed. 1573.

Federal Communications Com. v. *American Broadcasting Co.*, 347 U.S. 284, 98 L. Ed. 699, reviewed and enjoined similar general regulations applicable to all. See also, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 95 L. Ed. 817.

[4] Section 21(b) (15 USCA 717t(b)): "Any person who wilfully and knowingly violates any rule, *regulation*, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, *in addition* to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500.00 for *each* and every *day* during which such offense occurs." [Italics mine.]

[5] Mr. Justice Frankfurter's dissent in *Columbia, supra*, 316 U.S. 429, 433, 434, 86 L. Ed. 1577, 1580, characterized the prior cases of reviewability, "In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency." His

Any lingering doubts must have evaporated with *Frozen Food Express* v. *United States, supra.* These regulations were surprisingly similar to those involved here. It was an *Ex Parte* proceeding, with the report, seventy-one pages in length, listing specific items determined by the Interstate Commerce Commission to be within the agricultural commodity exemption of Section 203(b)(6), 49 U.S.C.A. 303(b)(6). Reversing a three-judge holding of nonreviewability on the rubric of *United States* v. *Los Angeles Railroad Co.,* 273 U.S. 299, 71 L. Ed. 651, the Court sustained reviewability since, "The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. * * * The determination made by the Commission is not therefore abstract, theoretical, or academic. * * * The 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. * * * Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. * * * Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'Order' of the Commission is in substance a 'declaratory' one * * * 5 U.S.C. 1004(d) which touches vital interests of carriers and ship-

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comment analyzing *United States* v. *Berwind-White Coal Mining Co.,* 274 U.S. 564, 71 L. Ed. 1204, as well as the other cases, *United States* v. *Baltimore & Ohio Railroad Co.,* 293 U.S. 454, 79 L. Ed. 587; *American Telephone & Telegraph Co.* v. *United States,* 299 U.S. 232, 81 L. Ed. 142; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U.S. 194, 56 L. Ed. 729; *Chicago, R.I. & P.R. Co.* v. *United States,* 284 U.S. 80, 76 L. Ed. 177; *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 83 L. Ed. 1147, involving specific penalties for violation of regulations, is significant: "Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable." *Id.* at 316 U.S. 334-336, 86 L. Ed. 1580, 1581.

pers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. * * *"

And *Frozen Food* was followed shortly by Storer Broadcasting Company, *supra*, holding general regulations determining eligibility for TV station licenses were orders reviewable at the suit of one in that business prior to the denial of a specific license application for, the Court said, "The Rules now operate to control the business affairs of Storer. * * * Storer cannot cogently plan its present or future operations. * * * These are grievances presently restricting Storer's operations." The *Columbia*[6] doctrine has

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[6] The key to the majority's misreading of *Columbia* is found, I think, in the preoccupation in the Magnolia opinion (No. 15320) with some supposed peculiar difference between a Section 402(a) (Title 47 USCA 402) Urgent Deficiencies Act, (October 22, 1913, 38 St.L. 208, 219, Chap. 32) and a Section 402(b) review which, for all practical purposes, is the same as Section 19(b) here. Significantly, Mr. Justice Frankfurter in his *Columbia* dissent completely ignored that point and in neither of the dissents in *Frozen Food Express* or *Storer* is it even mentioned as a valid basis for distinction. In *Storer*, of course, it was our precise situation — a statutory review by the Court of Appeals. In 402(a) and (b) and in 19(b), the requirement of an "Order" and the basis for reviewability is substantially the same. *Scripps Howard Radio, Inc.* v. *Federal Communication Commission*, 316 U.S. 4, 15, 16, 86 L. Ed. 1229, 1237, "It is urged that the orders reviewable under §402(a) * * * are intrinsically different from those reviewable under §402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. * * * As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington * * *." See also, *Philadelphia Co.* v. *S.E.C.*, D.C. Cir., 164 F. 2d 889 at 897, cert. den. 333 U.S. 828, 92 L. Ed. 1114, subsequent proceedings, 175 F. 2d 808, reversed as moot 337 U.S. 901, 93 L. Ed. 1715.

Amshoff v. *United States*, 7 Cir., 228 F. 2d 261, cert. den. 24 L.W. 3309, May 21, 1956, under the Hobbs Act, 5 USCA 1031, likewise reviewed, over the Administrator's contention that no definitive order had been entered, a general regulation which had the effect (as does much of the 174 Orders here) of repudiating an old and adopting a new administrative substantive policy.

The majority's emphasis (Magnolia 15320) on the requirement for, "A transcript of the record upon which the order complained of was entered" and the usual situation of an order, "of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case, *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375 * * *" cannot, by a bootstrap-lifting process, defeat reviewability. The absence of

an expansive vitality to require that Courts view these matters in the light of a living world.

I.
ORDER 174 CASES

A consideration of but a few parts of Orders 174 A or B will be demonstrate, I think, that the action of the Commission has tremendous practical, direct business consequences on those who produce natural gas.

The Order Determines Who Is Subject to the Act

When it is recalled that the whole sweep of the 174 Orders is to outline action to be taken by those brought under the Act by the Phillips decision, the definition[7] of "Independent Producer" has a positive and practical effect on the industry. This is so because it is the imprimatur of the Commission itself on the Phillips decision and, more so, it is one of doubtful validity. The doubt arises because the definition comprehends all those engaged in the production or gathering of gas who sell it in interstate commerce for resale. By its terms no distinction is made between those who sell *before* and those who sell *after* the production and gathering is completed. The regulation therefore reflects

a hearing, the receipt of evidence, the making of findings which is the very basis of much of the attack cannot thus be turned into a deficiency making it unreviewable, *National Coal Association* v. *Federal Power Com.*, D.C. Cir., 191 F. 2d 462, 466; *Saxton Coal Mining Co.* v. *National Bituminous Coal Comm.*, D.C. Cir., 96 F. 2d 517; *American Sumatra Tobacco Corp.* v. *S.E.C.*, D.C. Cir., 93 F. 2d 236; *Philadelphia Co.* v. *S.E.C., supra;* see also *Columbia Oil and Gasoline Corp.* v. *S.E.C.*, 3 Cir., 134 F. 2d 265, 267. And, of course, where validity of regulation presents question of law on the face of the orders or regulations a "record" of evidence is not needed, see discussion of cases under II, Suspension Cases, *infra.*

[7] §154.91 "'Independent producer' as that term is used in these Rules means any person as defined in the Natural Gas Act who is *engaged in the production or gathering of natural gas* and who transports natural gas in interstate commerce *or sells* natural gas *in interstate commerce for resale*, but who is not primarily engaged in the operation of an interstate pipeline." [Italics mine.]

the Administrator's interpretation[8] of an opinion which is, or may be, read much differently by others.

Whatever else the Court meant to say or do, it seems plain to me that the Court was being careful to point out that sales made during production or gathering were not within the scope of the decision:

> "* * * production and gathering in the sense that those terms are used in Section 1(b), end before the sales by Phillips occur." 347 U.S. at 678, 98 L. Ed. at 1045.

Nothing in that opinion[9] impairs the authority of its prior

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[8] Original Order 174 in the prefatory portions stated: "The decision of the United States Supreme Court on June 7, 1954, in *Phillips Petroleum Company* v. *Wisconsin et al* (347 U.S. 672) holds that persons engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or make sales in interstate commerce for resale are 'natural gas companies' subject to all the requirements of the Natural Gas Act. * * *"

In the Commission's brief in No. 15471, Gulf Oil Corporation, pages 1 to 3: "* * * These orders [174] stem directly from the decision of the Supreme Court in *Phillips Petroleum Co.* v. *Wisconsin* * * * in which that court held that the Commission has jurisdiction over independent producers which engage 'in "the sale in interstate commerce of natural gas for resale," and that such a company' is a '"natural gas company" within the meaning of that term as defined in the Natural Gas Act' (p. 677). By these orders the Commission * * * promulgated general rules and regulations to be applicable to natural-gas companies which were also independent producers subject to Commission jurisdiction under the Act. * * * the Supreme Court held in *Phillips Petroleum Co.* v. *Wisconsin*, * * * that sales in interstate commerce for resale by producers and gatherers to interstate pipeline companies do not come within the 'production or gathering' exemption, but that producers and gatherers making such sales also are 'natural-gas companies' under the Act, and the Commission has the authority to regulate such sales."

The Commission's brief in Magnolia No. 15320, page 4: "* * * the Supreme Court on June 7, 1954, held that the Commission had jurisdiction over sales of natural gas in interstate commerce for resale, including such sales in the area of production and gathering * * *."

This "extreme" view of the Phillips decision was successfully pressed by the Commission in *Federal Power Com.* v. *J. M. Huber*, D.N.J., 133 Fed. Supp. 479 (now on appeal Third Circuit).

[9] In the *Phillips* case (347 U.S. at 678, 98 L. Ed. at 1045-1046), the Court reaffirms the previous cases on Section 1(b): "In *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, * * * we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural gas company'. Similarly in *Colorado Interstate Gas Co.* v. *Federal Power Com.*, 324 U.S. 581, 598 * * * we stated that

holdings that Section 1(b) "* * * precludes the Commission from any control over the activity of producing or gathering natural gas," *Colorado Interstate Gas Company* v. *Federal Power Commission,* 324 U.S. 581, 603, 89 L. Ed. 1206, 1223; that the Commission has no power "* * * to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern", *Interstate Natural Gas Company* v. *Federal Power Commission,* 331 U.S. 682, 690, 91 L. Ed. 1742, 1748; that the regulations of the Commission may not be "* * * inconsistent with the exercise by [the states] * * * of the powers over production and gathering of natural gas reserved to it by Congress in §1(b) of the Act," Id. at 331 U.S. 691, 91 L. Ed. 1748.

It is because of the genuine and reasonable basis for difference in the interpretation of the Phillips opinion that the regulatory definition has such an impact. Until there was an administrative definition describing those persons who would come within the meaning of the Phillips decision, it would be a matter of individual interpretation. Even though it were ultimately determined by subsequent proceedings that such interpretation was the correct one, no one in the interim could have been subjected to penalties for the violation of a regulation (since none existed) and the continued reasonable doubt about the interpretation itself would prevent the severe penalties for a criminal violation under Section 21(a), 15 USCA 717t (a).

But with the definition by regulation, all of that is removed. All that is left now for the individual is the ultimate

'[t]ransportation and sale do not include production or gathering', and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. *Id.* 324 U.S. at 602, 603. See also, *Federal Power Com.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 612-615, 88 L. Ed. 333, 350-352 * * *; *Peoples Natural Gas Co.* v. *Federal Power Com.*, 75 App. D.C. 235, 127 F. 2d 153; cf. *United States* v. *Public Utilities Com.*, 345 U.S. 295, 307-311, 97 L. Ed. 1020 * * *."

validity of that definition. By force of this definition, one who produces natural gas and sells it for resale in interstate commerce is conscious that he is then subject to the Act and must conform all of his activities to it and must take the specific action which other sections of the Order command. I shall show in subsequent detail what these are, but even without this, it is completely unrealistic to say that profound consequences are not imposed when the Order, at its outset, transmutes, for example, the owner of the working interest in a small gas well from a simple entrepreneur into a quasi public utility. Like the trucker who hauled grapefruit and seeks frozen chickens to eliminate a dead haul, cf. *Frozen Foods, supra,* this act of Government has changed his whole economic life.

The Order Requires Filing Of Rate Schedules

In the face of the positive command for the filing of rate schedules[10] as of June 7, 1954, by all "Independent Producers", it is difficult for me to follow the majority's statement (Magnolia No. 15320), "* * * Order 174-A is not a formal determination of any right or obligation; is not self-executory, and it does not command these petitioners to do or refrain from doing anything * * *."

Since the Order (§154.92) is directed to an "Independent Producer" who is, in turn, defined in §154.91 to be those who make interstate sales while producing and gathering, this regulation is an immediate, positive, firm, absolute require-

[10] Order 174A, Section 154.92, "(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954 [subsequently changed to December 1, 1954] file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such * * * sale effective on June 7, 1954. * * * (b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate * * * sale * * * to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days * * * a rate schedule * * *."

ment for the filing of rate schedules. It is plain and unequivocal in its terms, and being a regulation, it subjects those who fail to comply to the severe penalties (note 4 *supra*) of "$500.00 for each and every day during which such offense occurs." Not only does it subject the producer to fines and penalties, but the filing of these contracts by its nature turns his business into one of public concern. What was the moment before Order 174 his business, now becomes the Commission's business. It may be that ultimately that is what the Phillips decision intended and the regulation will have a validity to achieve that end. But that does not remove the fact of the impact of this regulation upon this business man. It, and it alone, compels him under the pain of immediate penalties to alter his whole business concept.

And in this situation particularly, it is the impact of the regulation alone which brings about the necessity for filing of the rate schedules. The Act itself is not self-executing and requires the regulations as a condition precedent.[11]

Moreover, this specific provision of the Order illustrates well the futility of later, or more, or subsequent proceedings which the Commission insists are necessary to satisfy the requirement of exhaustion of the administrative process. E.g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41,

[11] Section 4(c) of the Act: "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such *time* * * * and in such *form* as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission * * *." [Italics mine.]

Whatever may be the juridical metaphysics, e.g., *Douglas* v. *County of Pike*, 101 U.S. 677, 25 L. Ed. 968; *Norton* v. *Shelby County*, 118 U.S. 425, 30 L. Ed. 178, of what the 1954 Phillips decision did to a 1938 Act, it is plain that the Commission never claimed that it had the right to or was regulating these independent producers, Columbian Fuel Corporation, 2 FPC 200; Fin-Ker Oil and Gas Production Co., 6 FPC 92; Chicago Corporation, 6 FPC 98; Phillips Petroleum Co., 10 FPC 246, and to suggest now that on the birth of *Phillips*, the general regulations covering interstate transmission pipeline companies applied automatically to these individual producers lacks genuine substance.

82 L. Ed. 638; *Public Service Comm'n* v. *Wycoff,* 344 U.S. 237, 97 L. Ed. 291; *Canadian River Gas Co.* v. *Federal Power Commission,* 10 Cir., 110 F. 2d 350, reh. den., 113 F. 2d 1010, cert. den. 311 U.S. 693, 85 L. Ed. 449; *United Gas Pipe Line Co.* v. *Federal Power Commission,* D.C. Cir., 181 F. 2d 786, cert. den. 340 U.S. 827, 95 L. Ed. 607. If a regulation is not valid either because it is too sweeping or, as claimed by some of these petitioners, it covers a person not within the Act, how is it to be tested? If the complaint is directed against a regulation compelling the filing of private papers, what more is needed to test that than the Order itself? What sort of administrative proceeding is reasonably needed if a citizen conscientiously thought that this provision of the Order was illegal? Must he surrender the very papers for public perusal which he contends are his own business? If he is hurt because he is threatened with the necessity of surrendering private documents, has it not become incurable if to test it, he must first comply?

The Order Requires Filing of Changes in Rate Schedules

Equally compelling, Section 154.94, is the imperative command that, "No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate * * * sale of natural gas * * * by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the * * * Act and in accordance with this section."

No status determination is needed here. The definition is "Independent Producer" and a sale which makes him one under Section 154.91 is all that is needed. From that moment on the regulation by its own terms is self-executing to impose the mechanical obligation of preparing and filing all such changes. Not only does that impose an obligation subjecting the producer to a $500.00 daily fine for noncompliance, but this has an immediate effect in circum-

scribing the nature and extent of his business negotiations, transactions, and agreements which he may make, or desire to make, with present or prospective customers. Surely an Order which states that no change can be made unless it is first filed has real and far-reaching effects. The very imminence of such a regulation calls for the immediate reconstruction of one's business. In the fundamental concept of its nature, it has, in the twinkling of an eye, ceased to be private and now becomes clothed with a certain public interest, or at least a certain public control.[12]

The Order Prohibits Automatic Contract Escalations

Here, without a doubt, the regulations promulgate a new and revolutionary policy having substantive consequences of great importance. For the Order, in connection with its requirements concerning the filing of rate schedules and changes in rate schedules, categorically states that contract escalations are a change of rate.[13] This has a substantial and immediate twofold impact: first, from a technical, procedural point of view, it has the effect of making the escalated rate a "new" or initial filing under Section 4(d)(e) with the complex problems of burden of proof and interim

[12] It should be borne in mind that questions of this type stated in emphatic terms are not to be taken as a conclusion that such Governmental supervision is wrong or invalid, or that the regulation is. We are here concerned only with an analysis of the Court's theme that Order 174 has no effect upon, does not require action by, these petitioning gas producers.

[13] Section 154.94 (Order 174A): "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule."

Substantially the same provision is contained in Section 154.94(c) of Order 174B except that this Section has been made even more specifically applicable to price changes provided for in an "initial rate schedule." In addition, Order 174B, Section 157.25, condemns, in advance, escalator clauses in producer contracts submitted in support of applications for Certificates which would, of course, affect interstate transmission pipeline companies, since long-term contracts for their essential gas reserves which have heretofore contained escalation clauses (see note 14 *infra*) could no longer contain them. This is thus a radical departure on a wide front from former substantive policies.

suspension flowing from that; and, second, the inability of the parties as a matter of actuality to enjoy the complete, prompt and uninterrupted performance of the agreements as made by them.

At the heart of both is the fact that, "* * * the Act, * * * evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates * * * may be set by individual contracts * * * The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. * * * By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, ... U.S. ...., ... L. Ed. ...., [No. 17 and 31, October Term 1955, February 27, 1956].

The petitions before us adequately show that these gas producers each have long-term contracts with various gas purchasers, interstate transmission pipeline companies in which, following the traditional usage of the industry with the full approval of regulatory agencies, provision is made for the automatic increase in the price of the gas under the stated conditions. The escalation provisions are the direct outgrowth of the necessities of the contract and of the pipeline purchaser. Those proposing an interstate transmission pipeline must have two principle things: one, financing in astronomical sums, and, two, certificates of public convenience and necessity from the Commission. Invest-

ment bankers and underwriters of these securities require long-term supply and outlet commitments to justify the economic forecasts of the promoter. And the regulatory agency which, by the Certificates both approves the construction of the line and the issuance of securities for its financing, demands a like showing to establish fitness, ability and capacity to serve.[14]

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[14] Reference here to the Suspension Cases, and particularly Stanolind (No. 15627) and Continental Oil Co. (No. 15678), involving as they do gas from the Woodlawn Field, Texas, removes this from the dreaded vacuum. The Federal Power Commission in the *Mississippi River Fuel Corporation* case (Docket G-1281, et al) in 1952 stated: "The most important matter presented for consideration in the instant Mississippi certificate proceedings concerns the adequacy of the gas supply showing made by Mississippi in support of its proposed system expansion. The importance of an adequate gas supply showing has been stressed by the Commission in certificate proceedings, since every certificate of public convenience and necessity under the Natural Gas Act must be based upon appropriate findings, among others, that the applicant for such certificate is 'able and willing properly to do the acts and to perform the service proposed.' 'An adequate gas supply,' as the Commission stated in its Opinion No. 230 and Order of June 24, 1952, *In the Matter of Northern Natural Gas Company*, Docket No. G-1618 * * * 'is the bedrock upon which such findings must be grounded.' 'A gas supply can be considered adequate,' as the Commission further stated in the *Northern* case, *supra*, 'only if the volume available is sufficient to meet the demand requirements for the service proposed, if such volume is assurred over a sufficient period of years to justify the expenditures required for the construction of the proposed pipeline project, and if that assurance of a continuing supply of natural gas meets the requirements of public convenience and necessity. Generally, a supply of natural gas should be assured for a period approximating fifteen to twenty years, dependent upon the particular facts involved, if the pipeline project is to be economically sound and in the public interest and if the natural-gas company is to be in position to meet its obligations to investors and provide dependable service to consumers.'" The Commission then recited that they had previously found Mississippi's supplies inadequate but allowed additional time to correct it. Acquisition of additional reserves is approved: "* * * At the 1952 hearings Mississippi showed that it had entered into additional gas purchase contracts, covering the purchase of gas in the * * * Woodlawn gas fields in Texas * * *. These contracts are for primary terms of 20 years and provide prices ranging between 10.88¢ and 12.46¢ per Mcf * * * at the beginning of their terms, and thereafter higher prices are specified. * * *"

Another Suspension Case, Union Oil (No. 15461), involves suspension of escalated rates under a long-term contract with Transcontinental Pipe Line Company resulting from a renegotiation of the contract long prior to June 7, 1954, made primarily to meet the objections of the Federal Power Commission in Dockets No. G-2367 and G-4185 (see opinions No. 279 and 280, December 1954, March 1955, respectively) to sufficiency of gas reserves. After restudy of the gas supply reserves showed them to be 16.6 to 17.9 years, Transcontinental's application for certificate to build and finance facilities costing approximately $40,000,000.00 to compete for the rich New York market area was approved.

The imperative requirement that the purchaser have a long-term contract makes it essential that, in the ordinary course of business judgment, the seller have some means of protecting himself against the unpredictable fluctuations or developments in the twenty-year period. These take the form normally of automatic step increases in price at stated times or intervals and "Favored Nations" clauses, single or general, to assure that the seller has the opportunity of enjoying the general increase in the value of gas in the area, reflected by genuine, good faith transactions or tenders, and, invariably, for proportionate increases in production, severance, or similar state taxes.

The immediate effect of this Order is, therefore, to destroy the binding character of the agreement made between seller (producer) and purchaser (pipeline). The rate may ultimately be the same, but only after someone has convinced the Commission, or Court, or both that what the parties agreed to do was fair, just and reasonable.

The Commission seeks to avoid this impact by insisting that the contract "rate" preserved by *Mobile, supra,* is the one being charged at the particular time and that what is payable before or after is of no consequence. That may ultimately be the rule of law. But it is not the rule of business and to assert it by this Order subjects these parties to real and damaging and pressing results. It becomes all the more devastating when, as I shall later discuss, we consider the effect of the Order requiring that an Independent Producer file an application for a Certificate of Public Convenience and Necessity to institute a sale and secure approval before he may abandon it. For here, by virtue of the Order 174 regulations, a person who, at the time of the contract, was considered an individual enterpriser under no Governmental restraint or regulation, is suddenly informed that the contract rates to be paid to him in the last

half of the contract period (and without which he would not have made the bargain) have no validity as a contract henceforth, and if collectible, they are so only by order after a hearing by a Governmental bureau. Anyone outside of a courtroom would say that that was a real and present impact. I think Judges must recognize it as well.

And this business impact is not limited to pre-existing contracts. These petitioners are engaged in the search for and continuous production of gas. How can it be said that the presence of this regulation evincing a determined radical change in policy does not have a weighty and pressing effect upon current business judgments and transactions? If truck owners and television station owners are given the protection of judicial reviewability of orders of general application, regulations which alter markedly their business activity or immediately encumber, frustrate or handicap business plans, *Frozen Foods, supra, Storer, supra,* I would think these producers make out as appealing a case. As long as this regulation stands, new contracts cannot be made which give this margin of protection against unknown future changes over the long contract periods. Somehow the business man, as the gas producer, will have to adapt his activities to that situation. If he raises his rates to secure the aggregate of what was formerly on a sliding scale, he may lose the purchase-sales contract. If he reduces the price to a lower figure, he may soon find himself with a contract out of harmony with his neighbors. The point here is not whether this is good law or bad law; whether the regulation is valid or invalid — it simply is that as long as it stands undetermined all business is unavoidably affected by it.

Until this regulation is tested and the validity of this policy is determined, a major industry must speculate. This is a serious and troublesome point of law which a

Court must and may determine. These Order 174 Cases and the Suspension Cases present it adequately for in both the Order does have an immediate, far-reaching consequence.

Nor can the impact of this pervasive policy against contract escalations be avoided or lessened by self-help,[15] since the customer (purchaser) of one of these producers is invariably an interstate pipeline transmission company and, being licensed under Certificates issued by the Commission, it is forbidden in fact and practice to pay more for its gas requirements than approved contracts permit. The present customer (purchaser) under an existing contract cannot pay more even though it is in accordance with its agreement and it desires to do so, and the seller (producer) can find no relief by a termination of the contract since, as we shall see, Commission consent is demanded under the Order for termination or abandonment.[16]

This administrative prohibition of automatic contract escalation provisions also has important, far-reaching, immediate and pressing technical consequences in the administration of the Natural Gas Act. These consequences, while technical, have profound substantive results. This is so because Section 154.94, if valid, makes an automatic contract

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[15] It is doubtful that Government (Administrators) should ever be permitted, in insulating their actions from judicial review, to assert that the citizen must run the bold course of defiance as a means of testing legality. "Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. * * *" *Columbia Broadcasting System, supra,* 316 U.S. at 418, 86 L. Ed. at 1571.

[16] This is what the producers sought to do in the Abandonment Cases (Lee, Trustee, 15749; Shank, Trustee 15832), but which, for nearly two years, the Commission has thus far prohibited.

rate increase, a "change in the rate schedule." If it is a "new" rate by virtue of the regulation, it then falls under Section 4(d) of the Act requiring filing and notice before its effective date and, more so, it is then subject to Section 4(e) which gives the Commission the right to suspend for five months and require a repayment surety bond for subsequent collections until the rate hearing is completed. To these sanctions is added a burden of proof to show that the increased rate is just and reasonable.[17] On the other hand, if the automatic escalation increase is but a part of the entire total contract rate,[18] the application of the automatic increase is not the promulgation of a *new* rate, and the review[19] of such rate would be by a hearing pursuant to Section 5(a).

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[17] Section 4(e), "Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, * * * pending such hearing * * * may suspend the operation of * * * such rate * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company. * * *"

[18] *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 298, 86 L. Ed. 855, 862: "The Master and the courts below, however treated these clauses as non-severable; to do otherwise would call for departure from accepted principles of the law of contract. Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all of the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.' Williston on Contracts, Rev. ed. §863 and cases there cited."

[19] "The powers of the Commission are defined by §§4(e) and 5(a). The basic power of the Commission is that given it by §5(a) to set aside and modify any rate or contract * * *. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long established or newly changed, but in the latter case the power is further implemented by §4(e). All that §4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract * * * the further powers (1) to preserve the status quo * * * by suspending its operation * * * and (2) thereafter to make its order retroactive, by means of the refund procedure * * *." *United Gas Co.* v. *Mobile Gas Corp.*, *supra*. [Italics by the Court.]

The Suspension Cases before us and the administrative experience[20] of the Commission demonstrate that this is no idle, academic, theoretical difference. It is the difference between suspension and no suspension, between money in the producer's hands and money in the purchaser's.

The Order thus introduces a revolutionary policy reversing a known business and administrative practice approved over the years. It is the regulation which does this and not the statute since, in the absence of the regulation, it would be open to producers and purchasers to place their own good faith construction upon Section 4(d) of the Act. But the regulation is imperative: a failure to file subjects the producer to a daily fine of $500.00. To collect the "new" rate, if the purchaser would pay it, would be another violation. Substantial doubts exist concerning the validity of the regulation. The doubt arises on its face. The danger and consequence, if invalid, is pressing and immediate. And no further record proof or evidentiary facts is needed to make it ripe for judicial determination.

The Order Requires Application for Certificate of Public Convenience and Necessity

The Order Forbids Abandonment-Termination of a Sales Contract without Commission Approval

The purpose of the Commission to bring all producers within the scope of its interpretation of the Phillips case

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[20] The Commission's letter report May 4, 1956, to Senator Gore revealed 191 cases involving annual increases (not including state tax increases) of $18,737,482.00 in which escalation rate increases have been suspended and hearing or decision is pending. Presumably, at least 5/12ths (5 months maximum suspension period) of this is an irretrievable loss to producers even though the Commission ultimately approves the increased rate. Apparently only 39 cases have been disposed of involving $3,218,297.00 annual increases, and the Examiner's reports and Commission decisions thereon submitted as typical examples of the Administrative problems indicate the complex matters which an applicant must face and perhaps shoulder in showing the proposed increase to be just and reasonable, e.g., is a fair price to be determined by the going price in the field? By invested capital, and if so, upon what basis, per well, or field, or unit? By a desired rate of return and if so, what percentage and upon what base?

(defined in Section 154.91) and to subject all such producers to the severe obligations of a public utility is manifest by Section 157 of the Order. Certificates of Public Convenience and Necessity[21] must be obtained for each service and the service may not be abandoned[22] without Commission approval.

As in the case of other sections of the Order which I have discussed, the regulation has a force transcending the Act. In the absence of a regulation, it is left to the individual gas producer to determine whether he comes under the Act, is a natural gas company, whether the Act (Section 7(c)) is to cover sales, whether the sale is one bringing him within the Act or the Phillips decision and, on termination or abandonment, whether the sale is a service rendered by

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[21] Section 157.23(a): "Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission * * * shall * * * file with the Commission an application * * * (b) No independent producer of natural gas shall, * * * engage in any new service with respect to the * * * interstate * * * sale of such natural gas for resale in interstate commerce * * * without approval of the Commission, evidenced by a certificate of public convenience and necessity * * *." The contents of the applications are carefully prescribed concerning exhibits, technical data required, etc.

[22] Order No. 174A provided: "Section 157.28 "No independent producer as defined in Section 154.91 of these rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained * * *."

In Order No. 174B this was changed by substituting the words of Section 7(b) of the Act and adding the proviso: "*Provided, however*, That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas."

The Abandonment Cases before us and other administrative action taken indicates that in the administrative application by the Commission there is no difference between 174B and 174A for sales are considered "service rendered by * * * such facilities" and abandonment of a sales contract by an "Independent Producer" is forbidden: see *J. M. Huber Corp.* and *Northern Natural Gas Co.* v. *J. M. Huber Corp.*, Dockets No. G-4326 and G-4957, *Federal Power Commission* v. *J. M. Huber Corp.*, D.C.N.J., 133 F. Supp. 479 (now pending Court of Appeals, Third Circuit, No. 11799, argued June 18, 1956); *Skelly Oil Co.* and *Lone Star Gas Co.* v. *Skelly Oil Co.*, Dockets No. G-5380 and G-5260; *Argo Oil Corp., et al*, Dockets No. G-6810, G-6811, G-2591 and G-2950.

means of jurisdictional facilities. If he or his lawyer guess wrong, he is exposed to the possibility of enforcement proceedings (Section 20), or criminal prosecution (Section 21 (a)) for "wilfully and knowingly" doing an act "declared to be unlawful," or as one who "omits or fails" to do an act "required to be done."

But with the regulation, all this is removed. It peremptorily requires the filing of an application for a Certificate, forbids the continuation of an existing, or the commencement of a new, service without it and forbids termination. Failure to comply subjects the person automatically to the penalties of $500.00 for each and every day during which noncompliance continues (Section 21 (b)). And all that would be open to determination would be the validity of the regulation.

It is just as obvious that these dual commands subject those in the gas business to substantial and immediate business consequences. As to existing contracts, the seller (producer) is helpless in his effort to enforce the mutual obligations for automatic escalation rate increases. His purchaser may not pay him the agreed increase. He must file his application as an "initial" rate under Section 4 and suffer the risk of a suspension and the burden of establishing the reasonableness of the rates. His only relief of self-help — that is, termination — is denied him because he must obtain Commission consent here as well. Whether as to existing contracts or the making of new ones, a producer knows that this subjects him to the far-reaching responsibilities of a public utility — a status which courts are reluctant to impose because of the inevitable encroachment upon normal business freedom unless the statutory command is clear, *Munn* v. *People of the State of Illinois*, 94 U.S. 113, 24 L. Ed. 77; *Wolf Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 67 L. Ed. 1103. All persons

dealing with a defined gas producer, whether banker, investor, processor, transporter, or purchaser, would of necessity have to trim negotiations and the final agreement to the pattern of public utility and its potential governmental regulation. Business men would know this instinctively. Judges, I think, should know as much.

And yet there is, at least, a substantial question whether the Act justifies a regulation imposing this *status* on the mere sale of gas, even one within the orbit of the Phillips case. There is a strong likelihood that the terms of the Act and legislative history will confine certification requirements to those constructing and operating physical facilities.[23]

There is even greater doubt concerning the right to forbid or regulate abandonment of sales since the Act[24] relates expressly to service by jurisdictional facilities. The Congressional purpose[25] to restrict the prohibition against

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[23] The command to apply for a certificate is found in Section 7(c). Its opening sentence restricts it to the completion of proposed facilities: "No natural gas company or person which *will be* a natural-gas company *upon completion* of any *proposed construction* or extension shall engage in the transportation or sale of natural gas * * *." (Italics mine.) This was the amendment of February 7, 1942, Public Law No. 444, 77th Congress, Chapter 49, Second Session [H.R. 5249], 56 Stat. 83. In its original form the Act required a certificate only when a company was entering a "market in which natural gas is already being served by another natural-gas company * * *." As investors and promoters were unwilling to risk the building of a line unless the statutory condition were met, it resulted in invariable hearings to prove the negative. The amendment was sought by the Commission to require certificates in the case of all *construction*, see hearings on H.R. 5249, 77th Congress, page 15 et seq.

[24] Section 7(b), "No natural-gas company shall abandon all or any portion of its *facilities* subject to the jurisdiction of the Commission, or any service rendered by means of such facilities * * *." [Italics mine.]

[25] The Act originated in H.R. 5423, 74th Congress, as amendments to the Public Utility Act of 1935 with a "facilities" provision identical with Section 7(b) (see hearings H.R. 5423, 74th Congress, 1st Session, pages 32, 44, §305(b)); the next bill, H.R. 11662, 74th Congress, 2nd Session, contained no prohibition on abandonment and representatives of the State Commissioners proposed an amendment that, "No gas company * * * shall discontinue service * * *," but this was rejected and language of present §7(b) was used. In the 75th Congress, 1st Session, on H.R. 4008, efforts by the New York Public Service Commission to obtain an amendment, "No natural gas company shall abandon service to any of its customers * * *" failed, and H.R. 6586, 75th Congress, 1st Session, which became the Act,

abandonment to services rendered by jurisdictional facilities seems quite plain and is, interestingly enough, apparently acknowledged by the Commission.[26] If, then, the proper construction of 7(b) is that it relates only to services rendered by jurisdictional facilities, the regulation would be invalid in prohibiting termination of sales contracts unless the given sale was accomplished through physical facilities owned or operated by that producer in the performance and rendition of the sale and such facilities were "subject to the jurisdiction of the Commission."

And finally, the petitioners urge with much basis, the *sale* of gas by a producer from a producing well is a direct and immediate part of production and is therefore within the full protection of Section 1(b). Nothing in the Phillips decision detracts from prior holdings that the Commission is powerless to regulate, forbid, prohibit, or direct the production of gas, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 93 L. Ed. 1499.[27]

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contained the language now found in §7(b). The Committee report, No. 709, 75th Congress, 1st Session, stated, "Subsection (b) requires approval of the Commission by any natural gas company desirous of abandoning any or all of its facilities subject to the jurisdiction of the Commission * * *."

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[26] By letter, June 17, 1955, from Chairman Kuykendall, Federal Power Commission, to Chairman of the Senate Committee on Interstate and Foreign Commerce, amendment of Section 7(b) was proposed to make clear " * * * that the Commission is authorized to pass upon the proposed abandonment of any sales in interstate commerce for resale by independent producers." See hearings, 84th Congress 1st Session, on S.712 et al, pages 1234, 1235. No such bill was passed. Apparently the Commission has sought from Congress legislation designed to impose a general service obligation, see hearings, 80th Congress, H.R. 4051, pages 99, 100, 428-430, 461-462, and has sought to amend Section 7(b), see Annual Reports 1951 at page 145; 1952 page 152; 1953 page 155; 1954 page 170.

[27] The Commission's Order forbidding the transfer of leases was reversed: "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act * * * In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 603, 89 L. Ed. 1206 * * * we said that this phrase comprehended the producing properties and gathering facilities of a natural gas company. We

If, without let or hindrance from the Commission, a certificated natural gas company can surrender or transfer its leases — that is, the right to the gas — because the leases and the gas covered thereby are a part of production, it seems difficult to believe that a producer cannot determine whether he will continue to permit gas which he is producing to leave his well, and if so, whether it shall go to one or to the other.

The present Order forbids this. It is ever-present in the shaping of gas transactions. And in the Abandonment Cases before us, it has kept particular gas producers from enjoying the fruits of and complying with the contracts made by the new purchasers with consequent substantial money losses.

The Order Compels Other Action

By operation of the Order, the magic date of June 7, 1954, is of critical importance. If it is valid, it orders a rollback of rates to a prior date. Imposing a retroactive rate which is beyond the general power of the Commission subjects producers to real and immediate harm. If it is not valid, it requires no record, no evidence to determine it. These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical

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now adhere to this natural and clear meaning of the words and their obvious expression of Congressional intent. Of course, leases are an essential part of production. * * * The Federal Power Commission leans heavily upon Section 7(b) * * *. The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission'." *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company, supra,* at 337 U.S. 504-509, 93 L. Ed. 1504-1507. And see *Colorado Interstate Gas Co.* v. *Federal Power Commission, supra, Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 91 L. Ed. 1742; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 88 L. Ed. 333, approved expressly in the *Phillips* decision.

consequences and the ripeness now for judicial review. Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive and judicial functions compels or suggests that review should be postponed.

II.
SUSPENSION CASES

In each of the Suspension Cases, the producer sought to collect the increased rate resulting from automatic contract escalation provisions. These rate increases were treated as "new" filings under Section 4 and were suspended for various periods of time. As thus presented each involves the question discussed at length concerning the nature of escalation increases and the Commission's power to forbid them. That is a serious question of law with substantial arguments on both sides. If what I have said is correct, then these petitioners in the Suspension Cases are certainly aggrieved and, as to them, the question is ripe for judicial review.

But the majority never gets to this point for the holding is simply that a suspension order, even though invalid, is not a Section 19(b) "Order." In my judgment, this ignores the significant absence of any modifying term such as "final" in Section 19(b) and is, again, a situation in which the Court has closed its eyes to reality. A suspension order is final in fact. As these verified petitions reflect, for the period of suspension the seller has been unable to collect what he claims is the rightful increase in rate. This amounts in dollars to huge sums of money individually and collectively. There is no relief because the Commission has no power to award reparations or to impose out of current rates an

amount needed to make up for a past deficiency due to an improvident suspension.[28]

Testing reviewability the hypothesis must be that the Order is invalid. On that assumption what more is needed, either to impose real, pressing, irreparable injury, or to present for review the serious question of law? Each of these Suspension Cases presents the common question: Is an escalation increase subject to suspension? If it is, then the matter must grind through the administrative process. If it is not, then no facts, no evidence, no peculiar circumstances can make it such. And the Commission's suspension order, in such an eventuality, ought to be set aside to restore the parties to their prior condition so near as the law may do it. Of course, the Commission cannot, to defeat reviewability, assert that "facts" are needed to prove that petitioners are subject to the Act, for the very act of issuance of the suspension order is a finding of coverage. Petitioners may question it on the review when granted, but the Administrator can not claim he lacked power to do what was done.

Moreover, it should be remembered that a suspension is a unique procedure from the standpoint of both the gas company and the Commission. The Commission's power is extremely limited. It may invoke it only within the 30-day notice time and it may not extend it beyond five months. Once the rate becomes effective, it is assumed that no power to suspend can be revived. Once the five months has ex-

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[28] *Federal Power Commission* v. *Hope Natural Gas Company, supra; State Corporation Commission of Kansas* v. *Federal Power Commission*, 8th Cir., 215 F. 2d 176; *Hope Natural Gas Company* v. *Federal Power Commission*, 4th Cir., 134 F. 2d 287, 310, "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission * * * regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission * * * As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates."

pired, the power is gone except insofar as the surety bond may continue it conditionally in effect. It is entirely separate from the hearings which must be held, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation, supra,* and whatever is done within the five months is forever and irretrievably final. When one seeks a judicial review of an order assumed to be invalid because it forever deprives a person of his right to recover substantial sums of money presumably due under a contract, and the question of its validity will have no bearing whatsoever on the ultimate approval of the rates involved, the appeal is not an effort, as characterized by my Brothers, to disturb the orderly administrative processes.

Precisely this problem — an illegal suspension order — was presented in *Atlantic Seaboard Corporation* v. *Federal Power Commission,*[29] 4th Cir., 201 F. 2d 568, and jurisdiction under Section 19(b) was sustained. I have searched in vain for those facts or legal principles which have led my Brothers to state, "We think that case is clearly distinguishable from the case at bar." And to it may now be added *Phillips Petroleum Company* v. *Federal Power Commission,*[30] 10th Cir., 227 F. 2d 470. See also, *Isbrandtsen Co.,*

[29] To the familiar lament from the Commission, the Court stated at 201 F. 2d 572: "We are not impressed with the argument that we are without jurisdiction in the premises * * *. The Commission argues that the order which we are asked to review is not a definitive or final order * * *; but our power to review is not limited to final orders. * * * The order which we are asked to review is therefore sufficiently distinct from the general subject of the litigation and sufficiently final and definite to justify us in exercising the power of review vested in us by the statute."

[30] The same objection was made: "Reviewability is thus not strictly limited to final orders. * * * And, reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review. See *Atlantic Seaboard Corp.* v. *Federal Power Commission,* 4th Cir., 201 F. 2d 568; * * *. The Orders sought to be reviewed here do not deal with the merits of the proceeding before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge Michi-

Inc. v. *United States,* D.C. Cir., 211 F. 2d 51, cert. den. 347 U.S. 990, 98 L. Ed. 1124; *Algonquin Gas Transmission Co.* v. *Federal Power Commission,* 1st Cir., 201 F. 2d 334. If the order is the only one which can ever be entered and no collateral proceeding depends upon it, it is sufficiently final, when realistically appraised, to permit reviewability where, on the hypothesis or substantial showing of doubtful validity, great and pressing harm will flow.[31]

Nor, in my view, does reviewability of the Suspension Cases depend finally on invalidity of the regulation forbidding automatic escalation. The parties raised other and substantial questions concerning the sufficiency of the administrative process. These include the repeated use of stereotyped suspension orders magnified in several instances by other stereotyped denials of rehearing and whether such rubber-stamped treatment met the demands of the statute that the Commission, in suspending, shall deliver "to the natural gas company affected thereby a statement in writing of its reasons for such suspension," Section 4(e); *Amarillo-Borger Express* v. *United States, supra,* and *Long Island Railroad Company* v. *United States, supra.* And, as to at least two of them (Stanolind 15627 and Continental 15678), the action bordered upon complete administrative irresponsibility since for the very same contracts covering the very same gas out of the very same wells, the Com-

gan on June 7, 1954 * * * the legal consequences which attach to these orders have conclusive effect on the rights and duties of Phillips as an independent producer * * * and they are therefore reviewable." 227 F. 2d at 474.

[31] See *Amarillo-Borger Express* v. *United States,* N.D. Tex., 138 F. Supp. 411, expressly approved and followed in *Long Island Railroad Company* v. *United States,* E.D.N.Y. [Civil Action 16321, May 9, 1956] .... F. Supp. ...., (statutory three-judge courts), in which an illegal revocation of a suspension order by the Interstate Commerce Commission was enjoined. The extensive materials dealt with under the Administrative Procedure Act raises considerable doubt in my mind that the Court's action here, in rejecting the Administrative Procedure Act, is correct. Of course, reviewability depends on the statutes and not what the parties say they invoke. See footnotes 2, 3 and 4, *United States* v. *Storer Broadcasting Co., supra.*

mission found, in the stereotyped rubric, that the identical rate should be suspended as to one seller but not as to a co-seller. In this and the other respects the State Tax Escalation Cases likewise fit in this category.

III.

ABANDONMENT CASES

In each of these cases, the producer (seller) had a right under the contemporary contracts to terminate the sale of gas. In one there was the right to obtain an increase in the price if bona fide offers were available from others. The current customer declined to meet the tendered increase, and the producer sought to exercise the contract right of termination and sell gas in the future to the new purchaser at the increased price. In the other, the producer sought to exercise his contract right to select his own purchaser and conclude a gas sales agreement with that new purchaser. By whatever label described, the letters and orders of the Commission have effectually prevented the producer from exercising the right to terminate, that is, abandon the sales contract. This is done pursuant to the indicated sections of Order No. 174. If, as the analysis indicates, there is substantial doubt that Section 7(b) covers sales when no jurisdictional *facilities* exist, that order is an illegal one depriving the petitioners of immediate, substantial benefits. If that order is illegal, it is so because of the limited nature of Section 7(b), and no facts, no evidence, no record is needed or essential to an orderly presentment of that substantial and serious question.[32]

By virtue of Section 154.97 (cancellation of rate schedules) and Section 157.23(b), it was likewise necessary for

[32] On the review, if granted, there would be a substantial question whether the Commission had the right to "reject", as they did, one or more of these filings. *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 3 Cir., 202 F. 2d 899.

these petitioners to file notice of termination of rate schedules and a request for the issuance of a new Certificate of Public Convenience and Necessity for sale of the gas to the new purchaser. If, on the anaylsis I have set out, these regulations are beyond the power of the Commission, it means that by their operation, the petitioners have been deprived of the immediate enjoyment of their private contract rights. That issue is present and has immediate consequences.

IV.

STATE TAX ESCALATION CASES

These cases raise the question of the collectibility of increases in the Texas State Production Tax as provided under automatic rate increase escalation provisions in the contracts. Thus they present, in dramatic fashion, the question so vigorously argued by all petitioners on the propriety of the regulation forbidding escalation clauses. The Court in arriving at a decision, presumably on the merits, completely bypasses this question. If, as my discussion indicates, that order may be invalid, then the Commission had no right in these cases to forbid Continental Oil Company from collecting the increase from its effective date (September 1, 1954). (I do not decide this question since I think it too important to determine until we, as a Court, reach it for deliberative joint judgment.) Moreover, the Court's opinion in emphasizing the fact that there was no proof in the record of discrimination in favor of other companies under like situations overlooks the fact that the petition for rehearing, declined by the Commission, raised those facts and that charge. When it was overruled, I am at a loss to understand how the petitioner could have made any proof. Finally, while the transmutations of the order and the change of dates from Septem-

ber 15 to October 1 and December 1 as set forth in the opinion is accurate, it seems to me that the whole Act imposes on the Commission the necessity of having some reasonable basis for its actions. Conceding, for the moment, that there was intended significance in what appears to me to be inadvertent scrivener errors made under circumstances of understandable and almost hysterical pressure, I would have considerable doubt that a Commission may say to one Texas producer that if the application is filed on October 1, the increase can relate to September 1, but if it is filed on October 2 or November 29, it may not. Not a single reason has yet been advanced to justify that differentiation, and it is evident from the fact that the 174 Orders finally extended filing dates to December 1, that the Commission did not articulately do this because of some administrative necessity. Finally, since the Court does reach some of the merits here, I can find in the record no basis for assuming that the sales involved in these contracts were within the jurisdiction of the Commission. Such findings and evidence is necessary. *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 L.Ed. 626, *Stark* v. *Wickard*, 321 U.S. 288, 80 L. Ed. 733; see also, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 512, 92 L. Ed. 128, 135.

I have written at such length as my views in all cases because I think these many troublesome legal questions are begging for a Judge's answer. What the answers will be, I do not know. But the Commission by its 174 Orders and action in the individual cases has presented cases ready and ripe for adjudication.

We shut ourselves off from life if we think that that which has had the gas business in such turbulence has, as yet, no affect or impact.

I therefore respectfully dissent.

APPENDIX B

JUDGMENT.

Extract from the Minutes of June 30, 1956

CONTINENTAL OIL COMPANY,

No. 15706 versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Continental Oil Company for a review of orders of the Federal Power Commission, entered on April 5, 6 and 12, 1955, and May 26, 1955, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the orders of the said Federal Power Commission in this cause be, and the same are hereby, affirmed.

"Brown, Circuit Judge, dissenting."

* * * * * * * * *

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

I, JOHN A. FEEHAN, JR., Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that identical judgments, except for the docket numbers, were entered in cases No. 15707 through No. 15721 as was entered in case No. 15706, CONTINENTAL OIL COMPANY, petitioner versus FEDERAL POWER COMMISSION, respondent.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at the City of New Orleans, Louisiana, this 31st day of August, A.D. 1956.

/s/ John A. Feehan, Jr.
Clerk, United States Court of Appeals for the Fifth Circuit.

[Seal: U. S.
Court of Appeals,
Fifth Circuit]

APPENDIX C

EXCERPTS FROM THE NATURAL GAS ACT

Section 1:

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

Section 4:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days

from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and

delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. §717c]

Section 5:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. 717d]

Section 19:

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written peti-

tion praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938); 15 U.S.C. § 717r]

Section 21:

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. [52 Stat. 833 (1938); 15 U.S.C. § 717t]

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith and Seaborn L. Digby.

In the Matter of

Compliance by natural-gas producers and gatherers with certificate and rate requirements } Docket No. R-138

ORDER NO. 174

REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, AND WAIVER OF ACCOUNTING REQUIREMENTS

All natural-gas companies subject to the Natural Gas Act are required by Section 7 thereof to obtain a certificate of public convenience and necessity before engaging in or discontinuing any transportation or sale of natural gas subject to the jurisdiction of the Commission, and by Section 4 of the Act they are required to file schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission. These companies are also subject to the jurisdiction of the Commission as to their accounts and reports. The decision of the United States Supreme Court on June 7, 1954 in *Phillips Petroleum Company* v. *Wisconsin*, et al. (347 U.S. 672) holds that persons

engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or makes sales in interstate commerce for resale are "natural-gas companies" subject to all the requirements of the Natural Gas Act. This decision affirms the decision of the United States Court of Appeals for the District of Columbia Circuit in *Wisconsin* v. *F.P.C.*, 205 F. 2d 705 (May 22, 1953), and reverses the holding of the Commission in Opinion No. 217, *Phillips Petroleum Company,* August 22, 1951 (90 P.U.R. (NS) 325).

• • • •

§ 154.94 *Changes in Rate Schedules* — *** Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, but prior to September 15, 1954, may be filed within said period without thirty days' prior notice, which notice is hereby waived. If the Commission in any case shall find it necessary to suspend any such proposed change, the suspension period will begin with the designated effective date of such change.

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APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper and Seaborn L. Digby.

In the Matter of

Compliance by natural-gas producers and gatherers with certificate and rate requirements } Docket No. R-138

ORDER NO. 174-A (SUPERSEDING ORDER NO. 174) ORDER PRESCRIBING REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, AND WAIVER OF ACCOUNTING REQUIREMENTS

By Order No. 174 issued July 16, 1954 (19 F.R. 4534) the Commission amended Part 154 — Rate Schedules and Tariffs, and Part 157 — Applications for Certificates of Public Convenience and Necessity, Subchapter E — Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in *Phillips Petroleum Company* v. *Wisconsin et al.*, 347 U.S. 672.

Upon further consideration of the matter, the Commission *finds*:

(1) Sections 157.23, 157.24 and 157.25 of the Regulations under the Natural Gas Act prescribed by Order No. 174 should be revised, as hereinafter provided, so as to allow those proposing to engage in the transportation or sale of natural gas in interstate commerce as independent producers to use one of the simpler forms of application therein provided and to clarify some of the requirements of those forms, and to clarify Section 154.94. Section 154.102, *Posting*, should be eliminated and Section 154.103, *Applicability*, should be re-numbered as Section 154.102.

(2) The other sections in Parts 154 and 157 of the Regulations under the Natural Gas Act prescribed by Order No. 174 which are not being revised or eliminated should be readopted and as so readopted, together with the revised Sections 157.23, 157.24 and 157.25, are necessary and appropriate to carry out the provisions of the Natural Gas Act.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U.S.C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002, 1003), *orders:*

(A) Part 154 — Rate Schedules and Tariffs — of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§154.91 *"Independent Producer" Defined.* — An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in the production

or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"* — (a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

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§154.93 *Rate Schedule Defined* — For the purpose of Section 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§154.94 *Changes in Rate Schedules* — (a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Com-

mission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature and basis for the pro-

posed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceeding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

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§154.96 *Filing Date* — Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.91 through 154.103 of these Regulations.

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§154.98 *Waiver of Notice Requirements* — Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon re-

quest and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 60 days before the effective date.

§154.99 *Number of Copies* — (a) Two copies of any rate schedule or part thereof, and material relating thereto, and Notices of Cancellation or Termination, submitted for filing must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

(b) Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

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(B) Part 157 — Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§157.23 *Applications for Certificate of Public Convenience and Necessity by Independent Producer* — (a) Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdic-

tion of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by October 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 14 copies) pursuant to Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by the attached Exhibit A. In those instances where a certificate of public convenience and necessity is required of a natural-gas company for the construction or operation of facilities to enable it to take natural gas from another natural-gas company, the applications for certificates of public convenience and necessity shall be filed simultaneously.

§157.24 *Contents of Application.* (a) Every application for a certificate of public convenience and necessity required under §157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or terri-

tory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines

over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit B of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plans, dehydration plants, purification plants, and gas storage projects.

(b) Notice of the application shall be given by applicant by service of a true copy of the application (without the exhibits provided for in § 157.25) upon the State regulatory commission, agency, or official having authority to regulate the transportation or sale of gas in every State in which applicant operated on June 7, 1954 or proposes to operate, or upon the Governor of the State when there there is no such State regulatory commission, agency, or official, by delivery of said copy in person or by registered mail.

§ 157.25. *Necessary exhibits* — There shall be filed with the application as a part thereof the following exhibits. Any information required which is already on file with the Commission may be incorporated by reference. If the application covers operations on June 7, 1954 and the applicant is unable to file any designated exhibit on or before

October 1, 1954, a statement setting forth the reasons for such failure should be submitted in lieu of the appropriate lettered exhibit and a further extension of time for filing the exhibit, not to exceed 90 days, may be granted. The following required exhibits are designed to amplify paragraphs (a) and (b) of § 157.24.

Exhibit A. If applicant represents a group of individuals, satisfactory proof of his authority to file the application.

Exhibit B. A general key map of applicant's facilities for the production, transportation, or sale of natural gas showing:

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in §157.24 (a)(4)(iv).

The map need be only of sufficient scale and in

sufficient detail to show the geographical location of the properties.

Exhibit C. The applicant may submit as many additional exhibits as may be deemed essential for consideration of the application.

§157.26 *Form of filing* — An application under §157.24 and §157.25 shall be in compliance with §1.15 and §1.17 of this chapter, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§157.27 *Other information* — The applicant may be required to furnish such additional information as the Commission may deem pertinent.

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(C) The rules and regulations herein prescribed are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) Order No. 174 issued July 16, 1954 is hereby rescinded and superseded by this Order.

(F) The Secretary of the Commission shall cause publication of this Order to be made in the Federal Register.

By the Commission. Commissioner Digby dissenting.

/s/ LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

Adopted: July 30, 1954
Issued: August 6, 1954

In the Matter of

Compliance by natural-gas producers and gatherers with certificate and rate requirements	Docket No. R-138

DIGBY, Commissioner, *dissenting*:

I find it necessary to restate my dissent from the conclusions by the majority of the Commission in connection with this Order since Order No. 174, carrying my dissent, is completely repealed by this Order. I do, however, approve of the changes which this Order makes from the provisions of Order No. 174.

In approaching our responsibilities in connection with the added jurisdiction of the Federal Power Commission over producers and gatherers of gas as outlined in the recent Supreme Court decision, it should be realized that we are dealing with the seventh largest industry in this country and that millions of consumers may be directly affected by our approach to this matter.

It is my opinion that the majority of the Commission has exceeded its rule-making authority in adopting this *ex parte* and unilateral order. The effect of this order will not only fix rates retroactively to June 7, 1954, but will in many instances have the effect of reducing rates or prices of producers which have increased under their sales contracts since June 7, 1954. Any retroactive date is arbitrary. There would be as much sanction in law for making these regulations retroactive to the effective date of the Natural Gas Act in 1938 as any other retroactive date. This, in my opinion, is in violation of the express provisions of the Natural Gas Act which prohibits the fixing of rates retroactively. I also feel that the Order may have the effect of depriving the producers of the provisions of Section 4 of the Natural Gas Act. Under Section 4 of the Natural Gas Act, a natural-

gas company may file an increased rate with the Commission, which rate can be suspended by the Commission for a period not to exceed five months after which time the company may collect the increased rate under bond awaiting a final determination by the Commission. In freezing the producer's rate as of June 7, 1954, they are deprived of any opportunity to file as an original rate schedule a sales contract in which the price of gas has increased since June 7, 1954. Further, original tariffs or rates cannot be suspended by the Commission and the company is entitled under the law to collect the filed rate at least until after an investigation by the Commission with a final determination concerning the rate. In these particulars, at least, it is my opinion that the Order adopted by the majority of the Commission may deprive independent producers, as defined in that Order, of their right of due process of law. The Order adopted by the majority of the Commission requires all independent producers who were selling gas into interstate commerce on June 7, 1954, to file with the Commission their sales contracts as of June 7, 1954. The Order further requires all of these producers to make application to the Commission for certificates of public convenience and necessity authorizing each and every separate sale in interstate commerce. It has been repeatedly stated that there are 2,300 such independent producers. Most of these producers who are selling gas in interstate commerce will have an average of three separate sales which would require a minimum of 6,000 applications for certificates of public convenience and necessity to be filed with the Federal Power Commission not later than October 1, 1954, and this in addition to the filing of all sales contracts under the rate provisions of the Order. From the records on file with this Commission, it appears that about 80% of all the gas being sold in interstate commerce is sold by approximately 61 companies and that

the remaining 20% is sold by over 2,000 small producers in twenty States. It seems to me that a more prudent approach to our regulatory responsibility would call for the institution of separate proceedings in connection with the 61 companies selling 80% of the natural gas with the right afforded to these companies of a public hearing under an order dealing with the rights of the parties in a prospective manner and not imposing regulations retroactively. By requiring the immediate filing of rate schedules and applications for certificates of public convenience and necessity authorizing each sale, I fear the Commission will be unable to see the forest for the trees. I do not suggest that the smaller producers be excused from regulation but I certainly would insist that the rules of the Commission be greatly simplified insofar as they are concerned and that ample time be given to these small producers to orderly comply with the Commission's regulations. I would give serious consideration to a grandfather clause qualification for these producers. I personally know that very few, if any, of the independent producers will have any understanding of their duties after reading the Order by the majority of the Commission. I also know it will be almost impossible for them to secure the services of attorneys who are in a position to tell them what to do without first making a thorough study and research concerning the Commission's rules and regulations which are very voluminous and greatly in need of revision and compiling.

Under the majority opinion, no producer's price can be increased after June 7, 1954, without a proceeding before the Commission. Our records here disclose that some transmission companies are purchasing gas from producers under firm contracts which contain provisions of one kind or another for the increase in the price of gas which has become effective or will become effective after June 7, 1954,

and before any opportunity can be afforded for the Commission to consider a producer's application to increase his rate to the transmission company. For instance, the Texas State Producing Tax becomes effective, according to my information, on September 1, 1954. Most purchase contracts of transmission companies provide for the payment by the purchaser of all or a part of this additional tax. Under the Order, the transmission company will be faced with the problem of paying the additional price and running the risk of never recovering it or refusing to pay it and run the risk of having its gas cut off for the non-payment of the purchase price. Of course, if this should be done, the transmission company would be faced with lawsuits by distributors to whom they are selling under firm contracts. All of these conditions could be properly taken care of by an order approving all existing firm sales contracts made in good faith and at arm's-length up to and including a future date of, say, October 15, 1954. This would give an opportunity to have both the producer and the transmission company before the Commission on the matter of price regulation concurrently and would eliminate many hardships and problems which, in my opinion, are unnecessary. This policy would simply be to continue for the purpose of securing good regulation the same policy which has existed since the adoption of the Natural Gas Act in 1938 and certainly an additional 60 or 90 days under the same rules and regulations which have prevailed in the past would be a small price to pay for an opportunity to approach this greatly enlarged regulation with thought and consideration.

Section 157.23(a) of the Order makes mandatory upon all producers who were selling gas in interstate commerce on June 7, 1954, the obligation to apply to the Federal Power Commission for a certificate of public convenience and neces-

sity to authorize such sale. In this connection, I would like to call attention to the fact that the Natural Gas Act, when passed by Congress, provided for a period within which any natural-gas company, as defined by the Act, could withdraw from its activities, or, in the absence of such withdrawal, should apply for a certificate of public convenience and necessity. Also, Rule 1.7(c) of the Commission's regulations provides for a declaratory proceeding for the determination of the question of jurisdiction. This Order not only refuses an opportunity to the producers to withdraw from any transaction which makes him a natural-gas company but makes the Order retroactive to June 7, 1954, and, in my opinion, is in violation of the purpose and intention of Congress in adopting the Natural Gas Act. I further feel that Section 7(b) of the Natural Gas Act, dealing with abandonment, may be subject to the interpretation that the abandonment which cannot be made without first obtaining a certificate therefor is the abandonment of facilities which have been certificated or the abandonment of services through *such* facilities. It is certainly indisputable that the provisions of this section of the Natural Gas Act and its treatment in Section 157.24 of the Order adopted by the majority of the Commission is subject to great doubt and deserves a determination after the interested parties have been given a chance to be heard. Section 157.24 of the Commission's Order makes a determination of this legal issue retroactively and without giving an opportunity to the interested parties to be heard on the subject. There is a strong possibility that this Order violates the due process clause of the Fifth Amendment of the Constitution, as well as the contract clause of Section 10, Article 1, of the Constitution.

It is my considered opinion that the majority of the Commission has permitted good intentions and plausible purposes with reference to immediate and positive action to lead them into error.

/s/ S. L. Digby
S. L. Digby
Commissioner

Filed: July 30, 1954

Issued: August 6, 1954

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matter of
compliance by natural-gas producers and gatherers with certificate and rate requirements } Docket No. R-138

ORDER MODIFYING IN PART ORDER NO. 174-A

Numerous petitions were filed for rehearing on Order No. 174-A which prescribes regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by producers and gatherers of natural gas which are also natural-gas companies. Rehearing on this order was granted by order issued September 8, 1954, for the purpose of receiving briefs and arguments in order that the Commission might determine whether to revoke or rescind Order No. 174-A or to modify that order in any respect. Briefs were filed by a number of petitioners and oral argument heard on behalf of some of the petitioners on September 22 and 23, 1954. The objections, recommendations, proposals and contentions of all of the petitioners, whether briefs were filed or oral argument presented on their behalf or not, will be given consideration.

Many of the petitioners have shown that compliance with the filing requirements by October 1, 1954, the date fixed in Order No. 174-A for certain purposes, would work a hardship. The Commission has already received approximately 350 applications for certificates of public convenience and necessity and approximately 1,500 rate filings under Order No. 174-A and in order to handle these filings in an orderly manner it is desirable to extend the time requirement.

The third paragraph of Section 154.94, Changes in Rate Schedules, should be clarified to express more precisely its applicability to rate schedules for new service initiated after June 7, 1954. The other points and issues raised in the petitions for rehearing will be decided as quickly as possible and appropriate announcement made.

It is necessary and desirable in the public interest and for the convenience of the Commission that the filing dates prescribed in Order No. 174-A for some purposes be extended as hereinafter provided and that the third paragraph of Section 154.94 be revised as hereinafter provided.

The Commission *orders*:

(A) The requirements in Order No. 174-A for filings by independent producers and gatherers by October 1, 1954, as specified in the following sections of the regulations therein adopted are hereby extended to December 1, 1954:

§154.92, Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies", subsection (a).

§157.23, Applications for Certificate of Public Convenience and Necessity by Independent Producer, subsection (a).

(B) The third paragraph of Section 154.94, Changes in Rate Schedules, is revised to read as follows:

"The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule."

By the Commission.

/s/ J. H. GUTRIDE,
J. H. Gutride,
Acting Secretary.

Adopted: September 24, 1954
Issued: September 24, 1954